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Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform

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The relations between the government and its informers are of extreme delicacy. Not to profit by timely information were a crime; but to retain in government pay and to reward spies and informers, who consort with conspirators as their sworn accomplices and encourage while they betray them in their crimes, is a practice for which no plea can be offered. No government, indeed, can be supposed to have expressly instructed its spies to instigate the perpetration of crime; but to be unsuspected, every spy must be zealous in the cause which he pretends to have espoused; and his zeal in a criminal enterprise is a direct encour-

> agement of crime. So odious is the character of a spy that his ignominy is shared by his employers, against whom public feeling has never failed to pronounce itself, in proportion to the infamy of the agent and the complicity of those whom he served.[1]

"FBI's Tipster Said He Built N.Y. Bomb."[2]

I. Introduction

Informant mishandling and misconduct victimizes many innocent people. Examples of the resulting harm include: prosecutions based upon informant perjury; false arrests due to unreliable informants; non-disclosure of informant information by prosecutors in criminal proceedings; informant abuses promoted through rewards; and felonious activity committed with the knowledge and, at times, assent of the police and prosecutors.

As used here, the term "handler" refers to the governmental law enforcement agent who has contact with, uses, and controls or attempts to control the informant. Thus, the handler could be a prosecutor, police officer, FBI or other federal agent, sheriff, or jailer. The term "informant" denotes a person who provides information, assistance, or some other benefit to a law enforcement agency in exchange for some benefit, whether immediate or in the future, tangible or intangible, personal or third party.

Informants are undoubtedly important in policing "invisible crimes:" where there is no victim, or the victim is reluctant to come forward and complain.[3] Law enforcement practitioners primarily claim informants are vital or indispensable to drug and conspiracy investigations.[4] Within a particular investigation, the benefits of informants include: (1) information that opens probes and starts investigations; (2) information that is more accurate, efficient, and comprehensive than that available from other sources; (3) corrobora-

1. 2 THOMAS E. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 277-78 (1863).

2. *FBI's Tipster Said He Built N.Y. Bomb*, CHI. TRIB., Dec. 15, 1993, § 1, at 7.

3. Mark H. Moore, *Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement, in* ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 21-23 (Gerald M. Caplan ed., 1983); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 115-16 (2d ed. 1975).

4. James R. Farris, *The Confidential Informant: Management and Control, in* CRITICAL ISSUES IN CRIMINAL INVESTIGATION 29 (Michael J. Palmiotto ed., 1984); MALACHI HARNEY & JOHN CROSS, THE INFORMER IN LAW ENFORCEMENT 27 (2d ed. 1968); JACK MORRIS, POLICE INFORMANT MANAGEMENT, § I at 10-11 (1983) (because only criminals can "gain . . . acceptance"); PETER REUTER, DISORGANIZED CRIME 148 (1983) ("the enforcement of laws against operators of illegal enterprises is critically dependent on informants"); JAMES Q. WILSON, THE INVESTIGATORS 62 (1978); Moore, *supra* note 3, at 34.

tive information; (4) the introduction of undercover personnel to persons, groups, and organizations involved in crime; (5) the consummation of illegal purchases; (6) a communications link between criminal groups and police; and (7) the timely receipt of information to prevent crimes.[5]

Law enforcement practitioners, grouped into the "conventionalist" and the "realist" models, agree on these basic precepts.[6] However, the conventionalists elevate law enforcement goals above all other considerations.[7] The conventionalists are very deferential to the police and believe the confidentiality and security of informants must be maintained at great cost.[8] Conversely, the realists examine how law enforcement functions, in reality, to reach goals and set expectations specific to informants. Although the realists view informants as a necessary evil in law enforcement's battle against crime, they acknowledge and account for the difficulties in attempting to control or handle informants, as well as the inherent shortcomings in their management.[9] Because the realists evaluate the effectiveness of control

5. MICHAEL D. LYMAN, PRACTICAL DRUG ENFORCEMENT 132 (1989); MORRIS, *supra* note 4, § I at 6; *see also* WILSON, *supra* note 4, at 62. Judicial treatment of informants has resulted in categorization as well. The typical informant fulfills one of three roles in criminal justice: the relation of information, United States v. Russell, 411 U.S. 423, 432 (1973); the infiltration of organizations, *see, e.g.*, Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984); and the establishment of criminal transactions, United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980); Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1092-93 (1951). *See generally* Michael F. Brown, *Criminal Informants: Some Observations on Use, Abuse, and Control*, 13 J. POLICE SCI. & ADMIN. 251 (1985).

6. These labels are my own construct. Herbert Packer utilized the labels "crime control" and "due process" to depict a similar division among the legal community's approach to criminal justice issues. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 158-73 (1968).

7. Their views extend so far as to implore officers to treat informants with respect, avoid pejorative labels such as "snitch" and "stool pigeon." The conventionalists prefer a short, non-descript definition of informant. *See, e.g.*, Farris, *supra* note 4, at 29 ("source of information"); HARNEY & CROSS, *supra* note 4, at 65 ("source," "complainant," or "special employee"); MORRIS, *supra* note 4, § I at 7-9 ("contributor" or, according to the FBI, "any person or entity furnishing information"). The realists prefer a longer, more incisive definition. *See, e.g.*, Moore, *supra* note 3, at 17, 33 ("covert governmental patrols reporting more or less regularly on a variety of possible offenses and offenders").

8. *See generally* HARNEY & CROSS, *supra* note 4. "Perhaps the biggest single weakness in the handling of informers by the American police—as far as we have seen the practice is worldwide—is the police's acceptance of the underworld attitude and vocabulary toward the informer." *Id.* at 64 (noting that, although informers are scum, unsavory and despicable, they still have feelings). Harney and Cross also believe that all informers should be confidential. *Id.* at 71.

9. The realists see a clear distinction between theory and reality given the personalities and the circumstances. *See, e.g.*, Peter Reuter, *Licensing Criminals: Police and Infor-*

and account for the inherent faults of informants, their views accurately represent how the mishandling and misconduct of informants persists and can be addressed.

The courts appear to have accepted the conventionalists' view when analyzing informant behavior.[10] While the vast majority of support for informant success is anecdotal,[11] conventionalists and courts use this "success" to justify using informants in nearly every type of criminal investigation.[12] In adopting the conventionalists' approach,

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mants, in ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 100, 103 (Gerald M. Caplan ed., 1983).

10. *See infra* text accompanying notes 134-231 (on criminal cases), notes 232-292 (on civil cases), and notes 350-87 (on courts and conventionalists).

11. WILSON, *supra* note 4, at 61; HARNEY & CROSS, *supra* note 4, at 21-22, 26 (discussing catching John Dillinger and others).

12. Farris, *supra* note 4, at 29 (political corruption, business fraud "and a myriad of other crimes"); HARNEY & CROSS, *supra* note 4, at 24 (national security); *Id.* at 29 (tax fraud). Additional crimes include, among others, gambling, prostitution, loan sharking, and fencing. Farris, *supra* note 4, at 29 ("and a myriad of other crimes"); HARNEY & CROSS, *supra* note 4, at 21-22, 26 (includes all associated crimes as well); Moore, *supra* note 3, at 34 (gambling and prostitution); *see also* FINAL REPORT ON THE SELECT COMM. TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEP'T OF JUSTICE, S. REP. NO. 682, 97th Cong., 2d Sess. 11 (1982) [hereinafter ABSCAM REPORT]. Moore sees a second layer of informant use as yet untapped, including investigations of police brutality and obstruction of justice. Moore, *supra* note 3, at 34. From its inception, the FBI relied substantially on informants. ABSCAM REPORT, *supra*, at 34. Early emphasis was placed on maintaining the cover of informants and the risks of agents provocateurs. 3 SENATE SELECT COMM. TO STUDY GOV'TAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES FINAL REPORT, S. REP. NO. 755, 94th Cong., 2d Sess. 383, 385 (1976) [hereinafter CHURCH COMMITTEE]. Concern for civil liberties and rights trampled by informant leads in 1920 following the Palmer Raids, *id.* at 385, and led to the first congressional investigation of the FBI. *Id.* at 382-88. As Congress investigated the Bureau, the FBI sent covert agents to investigate members of Congress. DON WHITEHEAD, THE FBI STORY 63, 65 (1956) (history written with Hoover's cooperation). At that time, J. Edgar Hoover was appointed FBI Director to clean house and did not favor the use of such informants. ABSCAM REPORT, *supra*, at 35. Hoover was concerned primarily that the use of undercover informants would raise criticism of the Bureau. *Id.*; 3 CHURCH COMMITTEE, *supra*, at 391.

In 1936 President Roosevelt changed this by directing the FBI to undertake investigations of subversive activities, including communism and fascism. *Id.* at 396. The Bureau relied heavily on informants in these endeavors. *Id.* at 391-399. Hoover continued to avoid investigations of racketeering out of concern over scandal and fear that the agents would be compromised. ABSCAM REPORT, *supra* at 36; WILSON, *supra* note 4, at 3. During World War II, the FBI began using informants to break in and install electronic devices or to search and seize information. 3 CHURCH COMMITTEE, *supra*, at 422-26.

The FBI's counterintelligence (COINTELPRO) program was the product of this narrow focus where the Bureau decided that the current laws were insufficient to provide domestic security. Individuals and groups that Hoover felt threatened domestic security were infiltrated, disrupted, and burglarized, resulting in a severe trampling of basic civil liberties. 2 CHURCH COMMITTEE, *supra*, at 10, 211-25; 3 CHURCH COMMITTEE, *supra*, at 358.

the courts disregard the realistic difficulties in handling informants[13] and the effectiveness of law enforcement techniques absent large scale informant use.[14]

The current curative suggestions from law enforcement—new guidelines, training, lists of do's and don'ts, and large scale investigations without any meaningful results[15]—do not target and will not resolve the problems. Informant abuses might be corrected if the responsible official or officials were investigated, disciplined, retrained, terminated, or criminally prosecuted. Law enforcement officials, however, are difficult to prosecute;[16] internal investigations usually result in exoneration.[17] In addition, the effectiveness of any

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In 1972, Hoover's successor, Clarence Kelly, openly employed informants in these unsavory areas. Dick Lehr, *Law Enforcement*, BOSTON GLOBE, Oct. 16, 1988, at A28 ("Without informants, we're nothing." Also quoting DEA official David Westgate stating that informants were "indispensable."). *See also* Basler, *infra* note 38, at B3 (depending more and more on informants); WILSON, *supra* note 4, at 35. The FBI also undertook investigations with other federal and local law enforcement agencies. ABSCAM REPORT, *supra*, at 40.

13. *See infra* notes 356-381 and accompanying text.

14. GARY T. MARX, UNDERCOVER POLICE SURVEILLANCE IN AMERICA 108-28 (1988).

15. *See infra* notes 314-326 (discussion of guidelines); INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY, REPORT OF THE 1989-90 LOS ANGELES GRAND JURY 50 (1990) [hereinafter GRAND JURY REPORT] (deputy sheriffs had similar training but had a wide range of definitions of informants, thus widening the range of persons eligible for protective custody); *Id.* at 149-51 (grand jury recommendations vague and superficial).

16. Absent a written record, the promise of reward for false testimony is impossible to prove. Ironically, the impossibility arises from a disinclination to prosecute an official using the same informant used to convict another criminal defendant. As a result, in California, the grand jury was only willing to criticize the Los Angeles County prosecutor and the sheriff. Ted Rohrlich, *Perjurer Sentenced to 3 Years*, L.A. TIMES, May 20, 1992, at B1, B4 [hereinafter *Perjured Sentenced*]. In United States v. Hammad, 858 F.2d 834, 839-40 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990), the court refused to read a disciplinary code to bar all contact between the U.S. Attorney and represented persons. Instead the court decided that the provision did not relate to or cover undercover operations unless the informant was acting as the alter ego of the U.S. Attorney. *Id. But see* United States v. Friedrick, 842 F.2d 382-83 (D.C. Cir. 1988) (conviction of FBI agent for giving false statements regarding the handling of Jackie Presser reversed due to failure to advise defendant of his rights during questioning); Ted Rohrlich, *Jail Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, at A25 (lawyer indicted for asking a jailhouse informant to give perjured testimony); Michael D. Harris, *Regional News (California)*, UPI, Mar. 23, 1988, *available in* LEXIS, Nexis Library, UPI File (prosecutor prosecuted); *Richardson's Prosecutor Admits Withholding Evidence*, UPI, Apr. 7, 1990, *available in* LEXIS, Nexis Library, UPI File (prosecutor admitted withholding evidence).

17. The FBI investigation and report into the handling of Gary Thomas Rowe exonerated the organization and the individuals. Gregory Gordon, *Washington News*, UPI, Dec. 15, 1980, *available in* LEXIS, Nexis Library, UPI File. However, the Los Angeles investigation found that the police had requested Cisneros to lie. Ted Rohrlich, *Jailhouse Inform-*

existing standards that do exist is highly questionable.[18] When a scandal does emerge, the investigator usually attacks the weakest links and the informants are prosecuted for perjury or another crime. Those whose conviction was based on the informant perjury, however, remain incarcerated unless a writ of habeas corpus is granted.[19]

Commentators have offered considerable criticism and many suggestions for reform in response to the courts' conventionalist view on informants.[20] The vast majority of these critics take a rights-based ap-

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ant Says He Lied at 3 Murder Trials, L.A. TIMES, Nov. 5, 1989, at A1, A38, A39, A40 [hereinafter *Jailhouse Informant Lied*]. After a court order, the Los Angeles District Attorney sent letters to trial and appellate lawyers in 150 cases saying that a jailhouse informant testified and that counsel might want to re-examine the case. Gigi Gordon & Casey Cohen, *An Update on the Jailhouse Informant Scandal*, CAL. ATTY'S FOR CRIM. JUST. F. 17, (Mar.-Apr. 1989).

18. *See infra* notes 314-326 and accompanying text.

19. Leslie White pled guilty to two counts of perjury. Rohrlich, *Perjurer Sentenced to 3 Years*, *supra* note 16, at B1, B4. Sidney Storch was also indicted for perjury. *Id.* Rohrlich, *Jailhouse Informant Lied*, *supra* note 17, at A38. Storch died fighting extradition to California. *Id.* The State of Alabama tried to prosecute Gary Thomas Rowe for participating in the Klan killings, however, the U.S. District Court enjoined the state from prosecuting Rowe because of his previous grant of immunity. Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982); *Regional News (Alabama)*, UPI, Dec. 17, 1981, *available in* LEXIS, Nexis Library, UPI File.

Kevin Dykes's request for a new trial was denied. Ted Rohrlich, *Challenge to Using Informers Dealt Blow*, L.A. TIMES, Nov. 8, 1989, at B1 [hereinafter *Challenge Dealt Blow*] (court found ample other evidence to convict although the original prosecutor described informant testimony as "critical"). William Bonin's writs of habeas corpus were denied. Bonin v. Vasquez, 807 F. Supp. 589, 595 (C.D. Cal. 1992) (Los Angeles conviction); Bonin v. Vasquez, 794 F. Supp. 957, 961 (C.D. Cal. 1992) (Orange County conviction).

However, Carlos Herrera Vargas's conviction was overturned because the jury could not test the credibility of Stephen Cisneros who admitted to lying about Vargas's confession. Rohrlich, *Jailhouse Informant Lied*, *supra* note 17, at A38. James Richardson was freed after 23 years, including one year on death row. *Richardson's Prosecutor Admits Withholding Evidence*, *supra* note 16. Arthur Grajeda was granted a new trial. Ted Rohrlich, *D.A. Admits Murder Trial Was Unfair*, L.A. TIMES, Aug. 2, 1990, at B1, B8 [hereinafter *Trial Unfair*].

20. George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 207 (1975); Donnelly, *supra* note 5; Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 BUFF. L. REV. 333, 336 (1984); Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713, 716 (1977); Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents and Informers*, 1976 AM. B. FOUND. RES. J. 1195, 1195-96; James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 3 (1988); Welsh S. White, *Regulating Prison Informers Under the Due Process Clause*, 1991 SUP. CT. REV. 103, 103-06; Jana Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL. L. REV. 755, 782-85 (1990); Evan Haglund, Note, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1440-41 (1990); Bruce D. Lundstrom, Note, *Sixth Amendment—Right to Counsel: Limited Postindictment Use of Jailhouse Infor-*

proach to protecting the public. This approach is predicated upon the assertion that individuals need not assume the risk of informant contact where basic constitutional rights are strengthened.[21] This view, however, assumes that the basic informant-handler relationship does not need reform.[22] Other critics suggest expanded defense cross-examinations of informants, prior judicial review for informant use, and expansion of habeas corpus relief for those convicted with perjured testimony.[23]

The rights-based approach significantly contributes in identifying violations of specific constitutional rights resulting from the mishandling or misconduct of informants.[24] Absent a thorough development

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mants is Permissible, 77 J. CRIM. L. & CRIMINOLOGY 743 (1986); David R. Lurie, Note, *Sixth Amendment Implications of Informant Participation in Defense Meetings*, 58 FORDHAM L. REV. 795 (1990); Note, *Judicial Control of Secret Agents*, 76 YALE L.J. 994, 1012-13 (1967) [hereinafter *Judicial Control*]; Robert L. Bergstrom, Comment, *The Applicability of the "New" Fourth Amendment to Investigations by Secret Agents: A Proposed Definition of the Emerging Fourth Amendment Right to Privacy*, 45 WASH. L. REV. 785 (1970); Bruce D. Pringle, Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 U. COLO. L. REV. 261, 279 (1969) [hereinafter *Suggested Limitations*]. *See infra* notes 284-310 and accompanying text.

Professor Donnelly, one of the first to criticize judicial control of informants, cynically concluded that the nature of the political times will dictate how courts deal with agents. Donnelly, *supra* note 5, at 1130-31. Other commentators have merely targeted certain aspects of informant use for criticism without presenting alternatives or improvements. *See, e.g.*, Milton Hirsch, *Confidential Informants: When Crime Pays*, 39 U. MIAMI L. REV. 131, 134-36, 154 (1984) (deals directly with contingent fees and targeting, but glibly suggests that criminal defendants still retain a panoply of legal means to address informant misconduct).

21. *See infra* notes 284-310 and accompanying text. Dix, *supra* note 20, at 210-15 (defining interest affected by undercover investigations); Donovan, *supra* note 20 (Fourth Amendment); Misner & Clough, *supra* note 20, at 731-45 (Thirteenth Amendment); Stone, *supra* note 20, at 1205-220; Tomkovicz, *supra* note 20, at 83 (Sixth Amendment); H. Richard Uviller, *Evidence From The Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1147 (1987) (Due process argument for "highly offensive" informant conduct not governed by specific Bill of Rights provisions); White, *supra* note 20, at 118-41 (due process); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 587-601 (1979) (due process); Lundstrom, *supra* note 20, at 764-69 (Sixth Amendment); Lurie, *supra* note 20, at 802-05 (Sixth Amendment).

22. See, e.g., Dix, *supra* note 20, at 207-09 (solution presented presumes the continued use of informants); White, *supra* note 20, at 119-40 (same); Haglund, *supra* note 20, at 1407 (same).

23. *See, e.g.*, Winograde, *supra* note 20, at 781-85 (habeas relief); Haglund, *supra* note 20, at 1424-33 (cross-examination); *Judicial Control, supra* note 20, at 1015-19 (judicial review); Martin L. Perschetz, Comment, *Domestic Intelligence Informants, The First Amendment and the Need for Prior Judicial Review*, 26 BUFF. L. REV. 173, 195-202 (1976-77) (same); *Suggested Limitations, supra* note 20, at 283 (same).

24. For example, Professor Dix thoroughly develops the law with respect to rules that can be developed for law enforcement investigations involving informants. *See* Dix, *supra*

and incorporation of the nature of the informant-handler relationship, however, this approach fails. Without an effective deterrent, informant mishandling and misconduct are destined to continue.

Suggestions to investigate and rethink the basic nature of the informant-handler relationship need to be further developed. One set of commentators has argued that the compulsion and indebtedness inherent in deferring the prosecution of an arrestee based upon an agreement to inform establishes a prima facie case of peonage under the Thirteenth Amendment.[25] Another commentator asserted that informants should be considered state actors within a Sixth Amendment framework of analysis when the government encourages the offending activity.[26] Both focus primarily on remedies that impact the criminal process and, as a result, instill only a limited amount of responsibility and accountability.

The proper solution necessitates creating greater accountability and responsibility for informant mishandling and misconduct. This article proposes a framework that builds on established constitutional rights and incorporates the nature of the informant-handler and informant-state relationships. The key to incorporating the informant relationship is to apply a rebuttable presumption that informant conduct is state action (as required by the Fourteenth Amendment) and action under color of law (in accord with § 1983). This presumption will instill responsibility in law enforcement agencies for their choice in using informants. This new state action/color of law relationship will have a significant impact upon how courts view informants in both criminal and civil litigation. In both contexts, the presumption creates a linkage between the government and the informant that necessitates the abandonment of both the assumption of risk doctrine and the distancing of the informant from the handler. In the criminal context, informants will no longer be free agents, but integral parts of the law enforcement apparatus. In civil litigation, plaintiffs will have an essential element for a § 1983 action and agency for a state tort claim or Federal Tort Claims Act (FTCA) claim. The presumption that the in-

note 20. However, his basic premise, that law enforcement officials will abide by the strictures, once formulated, for handling informants, is highly suspect. *See infra* notes 314-326 and accompanying text (ineffectiveness of informant guidelines).

25. Misner & Clough, *supra* note 20, at 731-34. Skolnick argues that the compulsion has at least one additional layer. SKOLNICK, *supra* note 3, at 264. If A is arrested based upon informant B's information, then unless A cooperates and makes a deal, B's identity will no longer be secret because of the need to testify against A. Skolnick calls this "lateral snitching." *Id. See also infra* notes 275-293 (on confidentiality).

26. Tomkovicz, *supra* note 20, at 74.

formant is a state actor, employee, or agent will also narrow the proximate causation gap necessary to hold law enforcement officers and agencies responsible and accountable.

This article first presents a history of informant misconduct and mishandling by law enforcement officials. Section I of this article describes recent instances of informant misconduct and mishandling. This section also describes the system of providing rewards to informants for information. Section II of this article presents judicial models of analysis of informant misconduct in both criminal and civil litigation. Section III discusses and critiques suggestions on informant control. Section IV discusses the correlation between current judicial doctrines on informants and the conventionalist law enforcement practitioner's approach. In addition, this section presents current legal standards for state action and action under color of law, and the similarity between these standards and the realist's law enforcement approach.

Section V presents the linkages between law enforcement and informants. These linkages are first discussed in the historical perspective of how informants have been associated with the criminal justice process, why certain aspects of that relationship were altered, and how many troubling aspects of informant use persist to this day. Next, the section shows how informant conduct meets the color of law requirement of § 1983[27] and the state action requirement of the Fourteenth Amendment.[28] Finally, this section addresses some of the consequences of this presumption in both civil and criminal cases.

II. Recent Informant Abuse

The documented mishandling and misconduct of informants involves federal, state, and local police, prosecutors, and jailers. The mishandling of informants has recurred in a somewhat cyclical pattern since the earliest days of the English common law. The pattern typically starts with widespread informant use, which is then curtailed after publicized misconduct or mishandling.[29]

27. 42 U.S.C. § 1983 (1988).

28. U.S. CONST. amend. XIV, § 1.

29. The presence of informants seems to permeate every major criminal investigation of late. *See, e.g.*, Ralph Blumenthal, *Defense Lawyer's Question Informers' Part in Bomb Plot*, N.Y. TIMES, Aug. 29, 1993, at 29 (World Trade Center Bombing); *Political Dragnet*, 257 THE NATION 304 (Sept. 27, 1993) (same); *see infra* notes 39-41 and accompanying text.

A. The Ku Klux Klan

The most widely noted occurrence of informant mishandling involved Gary Thomas Rowe.[30] Rowe joined the Ku Klux Klan as a Federal Bureau of Investigation informant in 1960.[31] While an informant under FBI handling, Rowe participated in a number of crimes. These crimes included: the murder of Viola Gregg Liuzzo,[32] the bombing of an African-American Church that resulted in four deaths, the shooting of black man, an attack on an elderly African-American couple,[33] and an attack on the Freedom Riders.[34]

Prior to the Freedom Riders' demonstration in Birmingham, Rowe informed the FBI of the upcoming Klan attack on the group.[35] Rowe and the Birmingham police agreed to allow the Klan fifteen minutes of uninterrupted brutality before law enforcement would intervene.[36] The FBI, however, decided not to intervene, allowing the Klan to attack and mercilessly beat the unarmed and unwitting Freedom Riders.[37] The FBI's decision illustrates how law enforcement balances using informants and tolerating their abuses.[38] Specifically,

30. Bergman v. United States, 565 F. Supp. 1353 (W.D. Mich. 1983); Bergman v. United States, 551 F. Supp. 407 (W.D. Mich. 1982), *aff'd*, 844 F.2d 353 (6th Cir. 1988). "[T]he FBI had developed a full and complete knowledge of the precise nature of the conspiracy between the Birmingham Police Department, the Alabama Klans and others." *Bergman*, 565 F. Supp. at 1386. Based upon the FBI involvement and statements, Rowe in fact thought the FBI would stop the violence. *Id.* at 1388.

31. *Bergman*, 565 F. Supp. at 1382.

32. *Bergman*, 551 F. Supp. at 421.

33. *Bergman*, 565 F. Supp. at 1382.

34. *Id.*

35. *Id.* at 1384.

36. *Id.*

37. *Id.* at 1381.

38. FRANK DONNER, PROTECTORS OF PRIVILEGE 308-12 (1992). Gary Thomas Rowe had previously impersonated an FBI agent and had been convicted of impersonating a police officer when the FBI started using him as an informant. *Bergman*, 565 F. Supp. at 1381-82. The FBI not only ignored, but conveniently overlooked the fact that they had approved Jackie Presser's hiring of ghost employees at a Cleveland union. United States v. Presser, 844 F.2d 1275, 1276-77 (6th Cir. 1988). At one point, Presser's handler wrote on a memo that if any of Presser's activities involved political figures or potential violence, the Director's approval should be necessary. Frank Swoboda, *Ex-FBI Head Was Told Presser's Illegalities Were Authorized, Court Papers Say*, WASH. POST, Apr. 8, 1988, § 1, at A18. Despite these and other ongoing criminal activities, the FBI continued to use Presser as an informant. *Id.*; Stephen Engelberg, *F.B.I. and Jackie Presser: Who Used Whom for What?*, N.Y. TIMES, Sept. 8, 1985, § 4, at 3 (also noting that Michael Orlando was overheard discussing criminal involvement while an informant, but was not arrested).

Melvin Weinberg was a convicted con man, whose informant status had been canceled once before when the FBI retained him to function as the central figure in Operation ABSCAM. Guccione v. United States, 847 F.2d 1031, 1032 (2d Cir. 1988), *cert. denied*, 493 U.S. 1020 (1990).

this case shows not only how informants will oftentimes exercise a great deal of control over law enforcement, but also how law enforcement will usually accede to the wishes of the informants.

B. The World Trade Center Bombing

The involvement of an informant, Emad Salem, with the FBI in February, 1993 bombing of the World Trade Center and planned bombings of other New York targets is ripe with allegations of informant mishandling. The FBI had a continuing relationship with Salem, who infiltrated circles of Muslim groups, in particular that of Sheik Omar Abdel Rahman. Throughout his relationship with the FBI, Salem recorded conversations with targets of the investigation and his handlers.[39]

According to the tapes, Salem obtained the timer for the bomb to be used at the World Trade Center for the group. The FBI, however, took the timer and gave Salem a replacement. When Salem introduced the replacement timer to the group producing the bomb, the FBI, fearing a connection to the bombing, entered the site and stole

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The New York police closed a file on a robbery committed by Kenny O'Donnell while O'Donnell was an informant. Barbara Basler, *City Police Paid $500,000 Last Year for Informants*, N.Y. TIMES, Aug. 31, 1982, at B3. Steven Woodworth had been convicted twice of theft and was required to seek mental health counseling as a condition of probation when the Bowling Green, Ohio, police signed him as an informant. The police then refused to arrest him when he bragged about his immunity from charge. Woodworth failed to raise in court his probation violations, his threats to others, his informant status, and his abuse of the informant position. Hiser v. City of Bowling Green, 3:93 CV 702, slip op. (N.D. Ohio Feb. 5, 1993); Mark Reiter, *Bowling Green Hit with Lawsuit Regarding 1992 Murder of Woman*, TOLEDO BLADE, Feb. 5, 1993, § 2, at 9.

In Illinois, John Tuttle had a history of drug and alcohol abuse when the FBI started to employ him as an informant. Kevin Cullen, *When Irish Eyes Aren't Smiling*, CHI. TRIB., July 4, 1993, (Magazine), at 18, 24. Later, the FBI approached two suburban Chicago municipalities about dropping charges (assault and battery and drunk driving and assault) against him. *Id.*

In San Diego, two policemen had an ongoing sexual relationship with an informer who was a prostitute. Mark Platte, *Some Evidence of Misconduct by Police Found*, L.A. TIMES, July 27, 1991, at B1. Problems with informants were rampant as police would allow informants to keep portions of narcotics used in drug buys. One female informant who testified against several police was found murdered. Mark Platte, *Probe of Police Reveals Only Petty Offenses*, L.A. TIMES, July 31, 1991, at B1.

Hilmer Sandini's file included a memo stating that he should never again be used as an informant. Anthony M. DeStefano, *Undercover Perils: The Dan Mitrione Story*, NEWSDAY, Sept. 23, 1988, § 2, at 2. Subsequent to the placement of the memo into his file, he became an informant with agent Daniel Mitrione. *Id.* Mitrione became deeply involved in drug trafficking, taking $850,000 in profits. *Id.*

39. Ralph Blumenthal, *Tapes in Bombing Plot Show Informer and FBI at Odds*, N.Y. TIMES, Oct. 27, 1993, at A1; Robert D. McFadden, *Spector of Terror*, N.Y. TIMES, June 26, 1993, § 1, at 1.

the timer. In order to mollify Salem, the FBI told him they would return the timer. Later revelations show that Salem played a still larger role in the bomb production.[40]

The tape recordings also contain repeated references to Salem's assertions that the FBI had the ability to prevent the bombing. FBI handlers, however, dissuaded Salem from raising this complaint to higher levels in the FBI and the bombing occurred as planned. For his informant work, the FBI paid Salem at least $500 a week, although the tapes reflect conversations and negotiations involving one million dollars.[41] Salem justified these expenses because of the cost of building the bomb.

C. Jailhouse Abuse of Informants

Jailhouse informants are the most readily mishandled, and able to take advantage of their targets.

1. The Fulminante *Case*[42]

Oreste Fulminante was jailed in New York following his conviction for firearm possession.[43] There, Anthony Sarivola befriended Fulminante.[44] Unbeknownst to Fulminante, Sarivola, (who presented himself as an organized crime figure), was in fact a former police officer imprisoned for extortion.[45] Sarivola was also a paid FBI informant.[46] Sarivola approached Fulminante and mentioned that Fulminante was a suspect in the murder of his step-daughter in Arizona.[47] Fulminante maintained his innocence and stated that she was killed by bikers looking for drugs.[48] Later, Sarivola told Fulminante

40. Ralph Blumenthal, *Tapes Show FBI Agreed To Return Timer for Bomb*, N.Y. TIMES, Nov. 8, 1993, at B3; Patricia Cohen, *Defense: Spy Was Bomber*, NEWSDAY, Dec. 15, 1993, at 7; *FBI's Tipster Said He Built N.Y. Bomb*, *supra* note 2, at 7.

41. Richard Bernstein & Ralph Blumenthal, *Bomb Informer's Secret Tapes Offer a Rare Glimpse Into Dealings With the FBI*, N.Y. TIMES, October 31, 1993, at A16; Ralph Blumenthal, *Plot Warning Is Reviewed By the F.B.I.*, N.Y. TIMES, Oct. 29, 1993, at B1; Blumenthal, *supra* note 39, at A1; Ralph Blumenthal, *Tapes Depict Proposal to Thwart Bomb Used in Trade Center Blast*, N.Y. TIMES, Oct. 28, 1993, at A1.

42. *See infra* notes 147-153.

43. Arizona v. Fulminante, 499 U.S. 279, 282 (1991). Prior to that time, Fulminante lived in Arizona with his wife and step daughter, Jeneane Michelle Hunt. *Id.* He reported Jeneane missing while he was supposed to be caring for her. *Id.* After she was found shot to death, the police suspected Fulminante but, in the end, filed no charges against him. *Id.*

44. *Id.* at 282-83.

45. *Id.* at 283.

46. *Id.*

47. *Id.*

48. *Id.*

that Fulminante was in physical danger because other inmates suspected him of the murder.[49] Sarivola offered to protect Fulminante on the condition that Fulminante tell him the truth about the murder.[50] Fulminante then confessed to Sarivola.[51] Fulminante was convicted of murder and sentenced to death.[52]

2. *The* Dykes *Case*

Kevin Dykes was arrested and placed in the protective custody section of the Los Angeles County jail because he was a witness to a murder.[53] The protective custody area is reserved for "keep away" inmates and detainees, such as persons suspected of murder, witnesses, informants, and any other inmates who are guilty of a serious offense or are at risk of physical injury.[54] The jailhouse informants incarcerated at the jail vied for the chance to "make" Dykes confess to the murder he had witnessed.[55] Three informants claimed to be

49. *Id.*

50. *Id.*

51. *Id.* Specifically, Sarivola told Fulminante that he knew he was "starting to get some tough treatment and whatnot" as a result of the suspicions. *Id.* Then, after the offer of protection, Sarivola said, "You have to tell me about it. . . . For me to give you any help." *Id.* Later, during a car ride with Sarivola and his fiance, the subject was again raised and Fulminante again implicated himself in the murder. *Id. See infra* note 186.

52. *Fulminante*, 499 U.S. at 284.

53. Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches: Trading Lies for Freedom*, L.A. TIMES, Apr. 16, 1989, § 1, at 31 [hereinafter *Jailhouse Snitches*].

54. GRAND JURY REPORT, *supra* note 15, at 9. The investigation revealed that little consistency existed in determining who should and who should not be placed in protective custody. *Id.* at 50. Commonalities among these inmates include high rates of recidivism and long sentences. *Id.* at 10.

The jailhouses at issue are the Central Jail and the Hall of Justice, which house "unsentenced male prisoners who are charged with non-bailable offenses or who are financially unable to post bail." *Id.* at 46. In addition, some prisoners who were currently serving sentences were transferred to testify. *Id.*

Studies have shown that jailhouse informants tend to be the most aggressive and feared inmates. James W. Marquart & Julian B. Roebuck, *Prison Guards and "Snitches"*, 25 BRIT. J. CRIMINOLOGY 217 (1985). The obvious irony, and great potential for breeding problems, was that the most manipulative prisoners were placed with the most susceptible. That is, suspected murderers were placed with informants. Absent Leslie White's public disclosure, it is unclear when, if ever, the process would have been revealed.

55. Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 53, at 31 (informants included Willie Battle, Jesse Williams, and Leslie White). Edward Moran, another jailhouse informant, testified for Dykes about how the others lied about Dykes's confession. Rohrlich, *Trial Unfair*, *supra* note 19, at B1, B8.

When a new suspect enters protective custody the informants start to devise how to "book" the person (tell the authorities of untruthful incriminating statements) and write their own ticket out of jail. GRAND JURY REPORT, *supra* note 15, at 16 n.9, 18 (inmates would discuss all day); Ted Rohrlich, *Jail Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, at A24 [hereinafter *Informant Owns Up*]. If general information

recipients of his confession.[56] Ultimately, Dykes was convicted based on his alleged confessions to the three jailhouse informants.[57]

3. *The* White *Case*

Leslie Vernon White exposed the ease and depth of the informant misconduct in the Los Angeles County jails. White spent a lengthy amount of time in the protective custody area of the county jail. To gain informant rewards, he fabricated plausible confessions of detainees.[58] While impersonating prosecutors, deputy sheriffs, police, or bail bondsmen, White used the jail telephones to contact various law enforcement agencies. During these conversations White obtained sufficient information about an inmate or detainee to fabricate a confession.[59] White then made another call and fabricated a record

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precedes the suspect into the informant tank, each informant may try a story "changing a word here or there," taking into account law enforcement's corrections of each, until someone gets the story right and accepted. GRAND JURY REPORT, *supra* note 15, at 18, 30. Many were "trained" to fabricate confessions through experience in jail. *Id.* at 20-25. Others used the coroner's officer for information or memorized an officer's badge number to use. *Id.* at 29. In one case, eight informants testified to confessions at one preliminary hearing. *Id.* at 38.

56. Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 55, § 1, at 31.

57. *Id.*

58. White admitted to committing perjury in a dozen cases, mostly major felonies. Rohrlich, *Informant Owns Up*, *supra* note 16, at A1. Often, knowing that this would enhance his credibility, White would tell the prosecutor that the accused threatened witnesses or the prosecutor. *Id.* at 24. White even committed perjury before a grand jury to get a defense lawyer indicted for soliciting perjury. *Id.*

59. In one of several demonstrations on the process, Leslie White was given a name and a telephone.

> The informant, representing himself to be an employee of a bail bond company, called the jail's Inmate Reception Center and was able to obtain the inmate's booking number, date of birth, color of eyes and hair, height, weight, race (Caucasian), bail ($100,000), case number, date of arrest, arresting agency (Sheriff's Special Enforcement Bureau), next court date, and where the inmate was housed in the jail.
>
> The informant next called the records section of the District Attorney's office. He said he was a Deputy District Attorney and asked for information on the inmate's case. He was given the name of the Deputy District Attorney prosecuting the case, the Deputy District Attorney's telephone number, and the name of a witness.
>
> A few calls later, the informant called Sheriff's Homicide and said he was "Sergeant Stevens" at the Central Jail. He was able to obtain the name of the murder victim, and the victim's age and race.
>
> The informant then called the Deputy District Attorney who was handling the case, initially identifying himself as "Sergeant Williams" with the Los Angeles Police Department. The Deputy District Attorney responded to the informant's questions by stating, "I'll tell you anything you want to know about the case," and proceeded to provide details about what the victim was wearing, where his body was found, the fact that the coroner's report said that death resulted from suffocation and/or drugs, that the victim's blood contained a fatally high amount of methamphetamine, that the defendant confessed to stuffing the victim in a trunk,

to prove that he and the accused were in jail together.[60] In the wake of public attention to this scandal, many other informants came forward to tell of their ability to abuse the system.[61]

Other Los Angeles County jailhouse informants utilized a wide variety of means to obtain the necessary information.[62] Informants would continuously fabricate confessions if one confession did not result in sufficient benefits. Thus, the informants established a "track record" for credibility and received bigger rewards.

These examples illustrate both the active and tacit approval of jailhouse informant misconduct. In other instances, however, jailers have helped "set up" the accused.[63] Such jailers have provided infor-

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and the prosecutor's personal opinion of the likely defense in the case. Near the end of the conversation, the informant gave his name as "Sergeant Johnson."

GRAND JURY REPORT, *supra* note 15, at 70. The Sheriff's Department and the District Attorney's offices each issued directives and guidelines requiring the verification of callers. After this, the informant did an equally successful demonstration for the television show, "60 Minutes." *Id.* at 72-73. *See also* Robert Berke, *An Update on the Informant Scandal*, CAL. ATTY'S FOR CRIM. JUST. F. 11, (July-Aug. 1989).

60. "The informant called a department of the Superior Court in Van Nuys, identifying himself as "Deputy District Attorney Michaels" with the Organized Crime Unit downtown. In response to the informant's request, the court bailiff ordered the informant and the inmate to be transferred to Van Nuys the following day." GRAND JURY REPORT, *supra* note 15, at 70-71. *See also id.* at 46-47; Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 53, at 30.

61. GRAND JURY REPORT, *supra* note 17, at 76-85. Stephen Cisneros stated that he committed perjury in five murder cases. Ted Rohrlich, *Jailhouse Informant Lied*, *supra* note 17 at A1. Daniel Armenta said he lied about hearing a person's to hear that person's confession. Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 53, at 30. Sidney Storch said he provided at least 12 false confessions (at least three for murder) and was only caught when he was trying to teach the system to someone else who informed on him. *Id.*

A subsequent Grand Jury investigation identified 153 cases in which jailhouse informants testified between 1978 and 1988 in Los Angeles County. GRAND JURY REPORT, *supra* note 15, at 4.

62. The methods of others varied. Sidney Storch investigated a name in the newspapers, then sold the information to others who were with the detainee to use to fabricate a confession. Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 53, at 30.

63. *See* GRAND JURY REPORT, *supra* note 17, at 22-31. "[M]any informants believe that law enforcement officials have directly or indirectly solicited them to actively conduct themselves to secure incriminating statements from other defendants." *Id.* at 19. Informants claimed that jailers made announcements to the general inmate population suggesting that an inmate was an informant in order to transfer that inmate to the informant section. *Id.* at 21.

Daniel Armenta said that the sheriff twice placed him with a suspect from his neighborhood in an effort to get information. Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 53, at 30. Because of his lies about the information, the suspect was held on high bail for over one year. *Id.*

Richard Slawinski was denied informant status until the sheriff visited a cellmate and provided enough information for Slawinski to create an acceptable confession. *Id.* at 31. The suspect was held on high bail for a year. *Id.*

mants with information from which a confession could be fabricated.[64] Jailers have also physically or psychologically pressured inmates to become or stay informants.[65]

D. Prosecutorial Abuse of Informants

Prosecutors also mishandle informants. In the United States Attorney's Office in Chicago, prosecutors catered to nearly every whim of several high ranking El Rukn gang members who agreed to testify against other gang members.[66] While the witnesses were housed at the Metropolitan Correctional Center, the prosecutors allowed private contact visits between witnesses and their wives and girlfriends.[67] The witnesses participated in sexual relations during these visits, and received (and later used) illegal drugs.[68] The prosecutors permitted the witnesses to obtain contraband (Ex Lax) to facilitate the passage of drugs through the witnesses' bodies.[69] The prosecutors knew of sexually explicit telephone conversations between witnesses and a paralegal,[70] suppressed positive drug test results, interceded on the

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In ABSCAM, the FBI allowed informant James Davenport to pose as a disgruntled ex-FBI agent and meet with indicted Congressman Richard Kelly, and his attorney. United States v. Kelly, 790 F.2d 130, 132-33 (D.C. Cir. 1986). Davenport discussed defense strategy with Kelly and his attorney and stole documents from Kelly's office, including a list of witnesses to be called. *Id.* at 133. Davenport then gave the documents to Melvin Weinberg who sold them to the FBI. *Id.*

64. See GRAND JURY REPORT, *supra* note 15, at 22-23 (supplying information on crimes); *id.* at 26 (left informant with defendant's file and prosecutor's telephone number); *id.* at 28 (feeding critical information).

65. On pressure, *see id.* at 23 (threat of torture); *id.* at 23-24 (threat to return to general population); *id.* at 24 (Deputy Sheriff broke informant's glasses when informant threatened to disclose the informant system and law enforcement's complicity); *id.* at 24-25 (pressure from other inmates).

66. United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993); United States v. Andrews, 824 F. Supp. 1273 (N.D. Ill. 1993); United States v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993); Matt O'Connor, *Ex-paralegal Says Prosecutor Used Drug Deals Against Rukns*, CHI. TRIB., Dec. 15, 1993, § 2, at 6; Matt O'Connor, *Official Called Rukn Floor "Out of Control," Judge Says*, CHI. TRIB., Jan. 20, 1994, § 2, at 4; Matt O'Connor, *Ruling Threatens Rukn Convictions*, CHI. TRIB., June 5, 1993, § 1, at 1; Matt O'Connor, *Rukn Prosecutors Are Accused of Side Deals with Ex-gang Chiefs*, CHI. TRIB., Dec. 11, 1993, § 1, at 5.

The Los Angeles Grand Jury found that informants "are permitted an unusual degree of contact with prosecutors." GRAND JURY REPORT, *supra* note 15, at 31 (accept telephone calls, act as intermediaries). Similarly, while not informants per se, the rewards given to these witnesses reflect the vast range of the government's power to tempt and placate, and the witness/informant's ability to turn the situation to his or her advantage.

67. *Boyd*, 833 F. Supp. at 1323-27.

68. *Id.* at 1325-26.

69. *Id.* at 1307.

70. *Id.* at 1328-29.

witnesses' behalf at the jail, and provided the witnesses with money, gifts, and access to government telephone lines.[71] This information was not disclosed to defense counsel at the trials in which the witnesses testified and the defendants were convicted.

In selecting informants, prosecutors have also failed to investigate or have simply ignored informant backgrounds. Prosecutors have held preparation sessions with informants, planted informants, and ordered the taping of conversations with represented persons.[72] At trial, prosecutors have continued to prosecute defendants despite having information that the informants have lied[73] or that an informant's status or background was not properly disclosed.[74] Prosecutors have also

71. *Id.* at 1289-322 (drug use and prosecutor's knowledge); *id.* at 1323-27 (contact visits); *id.* at 1327-28 (telephone privileges); *id.* at 1328-29 (sexually explicit telephone calls with paralegal); *id.* at 1331-32 (gifts, clothing and parties); *Burnside*, 824 F. Supp. at 1225-38 (drug use and prosecutor's knowledge); *id.* at 1250-64 (*Brady* violations); *id.* at 1241-45 (contact visits); *id.* at 1245-46 (telephone privileges); *id.* at 1247-48 (gifts); *id.* at and 1248-49 (sexually explicit telephone calls with paralegal).

72. GRAND JURY REPORT, *supra* note 17, at 99-101 (for individuals as well as groups of informants); Deborah Squires, *2d Circuit Modifies Ruling on Informants*, N.Y.L.J., Sept. 27, 1988, at 1 (U.S. Attorney set up meeting between informant and represented accused in violation of disciplinary rules).

73. Leslie White had told prosecutors, ten years earlier, of his perjury. In addition, he had been labelled a "flake." Berke, *supra* note 59, at 11. Israel Isaacs said he witnessed a murder, but was in jail at the time. When confronted with the lie, he continued to change his story until it conformed to reality. The prosecution noted that he was a liar, but still intended to use him as a witness. Isaacs was released, but the suspect was kept in jail for 10 weeks before the charges were dismissed. Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 53, at 31.

In another case, the prosecution knew the informant had more felony and perjury convictions than he admitted in testimony. James Rainey, *Defense Will File Complaints Against McMartin Prosecutor*, L.A. TIMES, Jan. 27, 1990, at B3.

See also Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986) (knowing use of false testimony in non-informant setting); GRAND JURY REPORT, *supra* note 15, at 16 (all but one informant admitted committing perjury at least one time).

74. United States v. Boyd, 833 F. Supp. 1277, 1335-51 (N.D. Ill. 1993); *Burnside*, 824 F. Supp. at 1238-41, 1251-64. The Los Angeles Grand Jury found significant evidence that the District Attorney's staff had full knowledge of informant abuses prior to the public disclosures. GRAND JURY REPORT, *supra* note 15, at 97-111. Edward Moran's previous lies in a murder case were not disclosed to the defense. Rohrlich, *Trial Unfair*, *supra* note 19, at B8. Prosecutor Frank Schaub admitted to withholding evidence and allowing perjured testimony that later helped free a murder convict after 23 years. *Richardson's Prosecutor Admits Withholding Evidence*, *supra* note 16. The conviction was based upon alleged confessions to jailhouse informants. *Id.*

In the case of informant John Tuttle, the prosecution claimed that Tuttle had a tape with incriminating statements made by the defendant. Cullen, *supra* note 38, at 18. The prosecution, however, lied in order to keep the case pending. A year later, the charges were dismissed because the tape did not exist. *Id.*

In ABSCAM, the prosecution did not disclose the identity of James Davenport to the defense. United States v. Kelly, 790 F.2d 130, 132 (D.C. Cir. 1986). Davenport posed as an

obtained short-term release for informants through misrepresentations.[75] Thus, prosecutors, jailers, and police have great discretion in handling informants that often results in their misuse.[76]

E. The Rewards System

Prosecutors, sheriffs, and police rely on the reward system to motivate informants. This system is the link between informant and handler in each of the above examples.[77] All levels of the informant-handler relationship are equally susceptible to abuse because the informant expects rewards and favors from the handler without any for-

ex-FBI agent and met with defendant Kelly and his attorney. *Id.* at 133. Davenport then stole documents from them during a meeting. *Id.*

75. GRAND JURY REPORT, *supra* note 15, at 34 (not for investigatory purposes); *id.* at 35 (informant arrested while out on temporary release in exchange for cooperation); *id.* at 35-36 (court revoked temporary release order when parole officer complained). Prosecutors have also abused the rewards of favorable resolution of charges, sentencing or incarceration. *Id.* at 75 (submitting letters and giving testimony to obtain dismissal of charges, lesser sentences or reducing terms of imprisonment). *See also Boyd*, 833 F. Supp. at 1351-65.

76. Other instances of harm arise not from a single source of mishandling, but rather from layers of mishandling by police, prosecutors, and jailers because of natural overlap in the criminal justice system. For example, a number of people were convicted due to the testimony of informant Stephen Cisneros, who claimed to have committed perjury several times. The police and prosecutors indiscriminately used, supported, and defended Cisneros even though a psychologist previously described him as an "inveterate liar." GRAND JURY REPORT, *supra* note 58, at 16; *Informant Lied*, NAT'L L.J., Jan. 8, 1990, at 6. The prosecution had this information, chose to ignore it and did not provide it to the defense when using the informant as a witness. *New Murder Trial Granted in Informant Scandal*, UPI, Dec. 15, 1989, *available in* LEXIS, Nexis Library, UPI File. The informant, Stephen Cisneros, had been an informant on the street and in jail. Rohrlich, *Jailhouse Informant Lied*, *supra* note 17, at A38; Ted Rohrlich, *Deals Won Jail Informant Freedom to Attack Again*, L.A. TIMES, Dec. 11, 1989, at A1 [hereinafter *Deals Won*]. He admitted to committing perjury in five murder cases. GRAND JURY REPORT, *supra* note 15, at 16; Rohrlich, *Jailhouse Informant Lied*, *supra* note 17, at A24. He also stated that his lies were at the behest of police. Ted Rohrlich, *Scandal over Jail Informants Forces Retrial*, L.A. TIMES, Dec. 16, 1989, at A1 [hereinafter Rohrlich, *Scandal Forces Retrial*]; Rohrlich, *Jailhouse Informant Lied*, *supra* note 17, at A40. In two instances he said that the police gave him the story to tell, in another they gave him the paperwork, and in another they connected him with another informant. Rohrlich, *Jailhouse Informant Lied*, *supra* note 19, at A39.

James Richardson was charged with poisoning his children. The prosecutor used the fabricated confessions of three jailhouse informants to convict him of capital murder and effectively cover up the local sheriff's complicity in the murder of the children. Richardson v. State, 247 So. 2d 296, 303 (Fla. 1971) (relying upon corroboration of jailhouse informant's testimony by each other). Richardson was initially on death row until then existing capital punishments laws were declared unconstitutional in 1972. He then served 23 years on a life sentence until an informant came forward. *Witness Recants Testimony*, UPI, Dec. 12, 1988, *available in* LEXIS, Nexis Library, UPI File.

77. RICHARD H. BLUM, DECEIVERS AND DECEIVED 170 (1972) (symbiotic working relationship between criminal informants and police).

mal controls on either party to the agreement.[78] In prison, the lure of rewards and the resulting manipulative ability of prisoners lead, not only to direct abuse of the rewards system, but also to inmate influence on the criminal process.[79]

Informants have come to expect rewards from handlers. These expectations are satisfied in a variety of forms depending upon the circumstances and demands of the parties. A prisoner may seek better conditions in prison, or some benefit to a third party.[80] An informant who faces pending charges may seek favorable consideration when charged, sentenced, or released.[81] Other informants may simply seek

78. Although prosecutors do have a duty to follow up on information, such as from the FBI and its agents, Bergman v. United States, 551 F. Supp. 407, 417 (W.D. Mich. 1982), this appears to be far from routine. In general, the prosecution has a duty to seek the truth and correct any misleading testimony. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 153-54 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959); *In re* Ferguson, 487 P.2d 1234, 1238 (Cal. 1971); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1983).

79. One attorney testified that after his client witnessed an incident, he was then placed with informants. GRAND JURY REPORT, *supra* note 15, at 38-39. At his client's preliminary hearing eight informants testified that his client had confessed. *Id.* Thereafter, more informants called him and he became concerned that they might claim that he said something. *Id.* "You become at the mercy of these people." *Id.*; *See also supra* notes 58-61 and accompanying text.

80. On better conditions, see GRAND JURY REPORT, *supra* note 15, at 12 (extra telephone calls, visits, food, movie or television access); *id.* at 13 (transfer to a cell with a television and coffee pot); *id.* at 14 (transfer to a better jail); *id.* at 15 (spared disciplinary procedures); Berke, *supra* note 59, at 11 (private stereos and televisions).

On third party benefits, see GRAND JURY REPORT, *supra* note 15, at 13 (decrease bond on girlfriend); *id.* at 15 (paid $100 to informant's wife).

81. According to the Grand Jury Report, informants even asked the Special Counsel appointed in the probe for help after testifying. GRAND JURY REPORT, *supra* note 15, at 22.

On the charges, see *id.* at 13 (drop charges); *id.* at 92-94; People v. Williams, 751 P.2d 901, 906 n.5 (Cal. 1988) (testimony of informant reduced the charges against him), *cert. denied*, 488 U.S. 975 (1988); Cullen, *supra* note 38, at 24 (FBI interceded in assault and battery, then in drunk driving and assault charges); Reiter, *supra* note 38, at 9 (local police ignored request to arrest informant for violating probation); Rohrlich, *Challenge Dealt Blow*, *supra* note 19, at B1 (dismissal of charges); Rohrlich, *Deals Won*, *supra* note 76, at A24 (prosecutor sent commendation letter to prosecutor of informant); *Witness Recants Testimony*, *supra* note 76, at 2.

On sentencing, see GRAND JURY REPORT, *supra* note 15, at 13 (reduced sentence; in one instance three police officers testified for an informant at sentencing); *id.* at 92-95; Mark Platte, *3 Officers Suspended in Team Inquiry*, L.A. TIMES, Nov. 7, 1991, at B1 (prostitute's sentence for passing bad checks reduced two months after she gave police information linking officers and prostitutes); Reiter, *supra* note 38, at 9 (informant began working for police after arrested for writing bad checks); Rohrlich, *Deals Won*, *supra* note 76, at A26 (rape sentence reduced from six years in a mental institution to two years in jail); Rohrlich, *Jailhouse Informant Lied*, *supra* note 17, at A40 (robbery sentence reduced from 15 to two years).

A federal statute specifically includes latitude to incorporate informant benefits for a downward departure from the sentencing guidelines. "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute

cash payments or gifts.[82] Government budgets finance this reward system.[83] The rewards system instills not only the desire and need for

as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 28 U.S.C. § 994(n) (1988).

Thus, the sentencing guidelines anticipate a wholesale departure where the prosecutor seeks lenience for someone who cooperated as an informant. *See* U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS § 5k1.1 (1987); Tony Garoppolo, *Downward Departures Under the Federal Sentencing Guidelines*, 26 CRIM. L. BULL. 291, 300-01 (1990). However, the guidelines provide for no such departure in the case of government and/or informant misconduct. James A. Plaisted, *Softening Tough Federal Sentencing Guidelines*, N.J.L.J., Apr. 18, 1991, at 11. However, some courts have done this on their own. United States v. Medina, No. 89-0592CR, 1990 WL 106785, at *3 (S.D.N.Y. July 27, 1990) (downward departure where government coerced or provoked defendant's behavior through informant); United States v. Ferrand, No. 89-0592CR, 1990 WL 106783, at *2 (S.D.N.Y. July 27, 1990).

On release, see GRAND JURY REPORT, *supra* note 15, at 13-14 (release 10 days after sentenced for manslaughter); *id.* at 33-34 (informant drafted letter of recommendation to Board of Prisons, the contents of which were not verified); *id.* at 92-94; Basler, *supra* note 38, at B3 (most informants are "working off" their cases to reduce their sentences); Rohrlich, *Challenge to Using Informants Dealt Blow*, *supra* note 19, at B8 (furloughs); Rohrlich, *Deals Won*, *supra* note 76, at A26; Rohrlich & Stewart, *Jailhouse Snitches*, *supra* note 53, § 1, at 31 (Isaacs released).

82. On cash payments, see GRAND JURY REPORT, *supra* note 15, at 14 (pocket change); *id.* at 15 ($100 to $300 after release; $300 for testimony); *id.* at 133-39; United States v. Kelly, 707 F.2d 1460, 1462 (D.C. Cir. 1983) (FBI paid Melvin Weinberg $1000 a month from 1978-1979 and $3000 a month thereafter in ABSCAM); Basler, *supra* note 38, at B3 (police paid $1000 per kilogram of 80% pure heroin not to exceed $5000); Cullen, *supra* note 38, at 19 (FBI paid John Tuttle $20,000 over nine months). Of New York's 300 confidential informants in 1981, 40-60 worked for direct cash payments. Basler, *supra* note 38, at B3. In ABSCAM, Melvin Weinberg was paid $133,150 plus a lump sum contingent upon the overall operation's success. MARX, *supra* note 14, at 153.

In California, money from the Victim-Witness Protection Fund is allocated to informants. During the 1989-1990 fiscal year, $100,000 was used where informants cited a threat, charges had been filed, and a witness would testify. GRAND JURY REPORT, *supra* note 15, at 135. There is no follow-up procedure to check the veracity of the information given, aside from requiring receipts, once the officer makes his request for payment. *Id.*

Specific federal statutes empower the Attorney General to authorize payments to informants. *See, e.g.*, 18 U.S.C. § 1963(g)(3) (1988) (allowing informant compensation from forfeiture proceeds for violations of RICO under 18 U.S.C. § 1962 (1988)); 19 U.S.C. § 1619 (1988) (allowing compensation to informers for providing information on customs and navigation law violations of 25% of the proceeds up to $50,000); 21 U.S.C. § 886(a) (1981) (allowing Drug Enforcement Administration appropriations to be paid to informants); 26 U.S.C. § 7623 (1988) (allowing Secretary of Treasury to pay informants for information on Internal Revenue Code violations); 28 U.S.C. § 524(c)(1)(B)-(C) (allowing for payment of informant expenses).

On gifts, see GRAND JURY REPORT, *supra* note 15, at 14 (cigarettes, candy, doughnuts, cookies); *id.* at 15 (lunch outside prison and free apartment rent after release); Basler, *supra* note 38, at B3 (rent, phone bills, hotel and restaurant tabs, or even interest on loans); Rohrlich, *Jailhouse Informant Lied*, *supra* note 17, at A38 (cigarettes).

83. Between 1991 and 1993, the federal government paid more than $1.5 million to informants for information to locate and prosecute terrorists. *Reward to Be Offered for 2d*

more rewards in the informant, but also establishes the systemic support for the informant to maximize the benefit at any cost. For example, government handlers are given wide discretion, little guidance, and little training in making this assessment. Most contemporary police departments do not have standards or guidelines for informant control.[84] Prosecutors are generally "left to individual discretion" on handling informants. District Attorneys have promulgated no regulations or guidelines to direct prosecutors on the disclosure of informant information to the court. Thus, prosecutors are not instructed as to when rewards may be too enticing or counter-productive. Without such guidelines, law enforcement easily avoids any balancing of rights.[85]

III. Judicial Models Addressing Informant Misconduct

The U.S. court system has countenanced the use and tolerance of informants since its inception.[86] Courts confront and address informant misconduct or mishandling in both criminal and civil litigation. Often courts fail or refuse to recognize the handler's accountability and responsibility for the informant. This approach denies the existence of linkages between the handler and the informant while simultaneously denying adequate relief to the victims of informant misconduct. Denying the handler's accountability represents the pervasive impact of the court's assumption of risk doctrine as developed

Fugitive in Bombing, AP, Sept. 11, 1993, *available in* LEXIS, Nexis Library, AP File. In 1988 the Drug Enforcement Administration released information indicating an annual informant budget of two to four million dollars. Lehr, *supra* note 83 at A27. In 1981, the New York Police Department spent almost $500,000 on informants. Basler, *supra* note 38, at B3. In 1975, the FBI spent $2 million on the purchase of information and $3.5 million on informants. WILSON, *supra* note 4, at 77.

84. David Rudovsky, *Police Abuse: Can The Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 474 (1992).

85. GRAND JURY REPORT, *supra* note 15, at 76-84 (examples); *id.* at 95 (letters). In California, prosecutors have an obligation to the jury to aid in performing their function. People v. Phillips, 711 P.2d 423, 432 (Cal. 1985).

86. In United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), Judge Learned Hand was faithful to the traditional law enforcement view in providing the oft-quoted statement: "Courts have countenanced the use of informants from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly." *See also* Weatherford v. Bursey, 429 U.S. 545, 557 (1977); United States v. Russell, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting); Hoffa v. United States, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting). Legal commentators agree also. See, e.g., Dix, *supra* note 20, at 210; Tomkovicz, supra note 20, at 3 (1988); Yale Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 69 (1978).

in the context of Fourth Amendment challenges to searches and seizures.

Courts typically find an informant's misconduct to be independent of the government handler or sufficiently distanced from the handler to break any causal connection. Most courts hold that people assume the risk of their statements when they confide in others, including informants.[87] The only cases in which courts consistently find informants to be acting under color of law are those which fall under the Federal Wiretap Act.[88] Thus, the courts are generally unreceptive to victims' pleas of informant misconduct and mishandling.

The judicial doctrines of assumption of risk and distancing permeate both civil and criminal proceedings. More often than not, the court will find that no linkages exist between handler and informant. In the criminal context, the victim can raise known misconduct in a suppression hearing, a motion to dismiss the charges, or a motion for a new trial.[89] In applying the assumption of risk and distancing doctrines, the motion may be denied because the harm was not error or only harmless error.[90] In the civil context, the victim may bring a state

87. "The due process clause does not protect [a defendant] from voluntarily reposing his trust in one who turns out to be unworthy of it." United States v. Simpson, 813 F.2d 1462, 1466 (9th Cir. 1987), *cert. denied*, 484 U.S. 898 (1987); *see infra* notes 98-133, 158-175 and accompanying text. Courts have even imposed on the government a duty to protect informants. Swanner v. United States, 275 F. Supp. 1007, 1010 (M.D. Ala. 1967), *rev'd on other grounds*, 406 F.2d 716 (5th Cir. 1969).

88. 18 U.S.C. § 2511(2)(c) (1988); Obron Atlantic Corp. v. Barr, 990 F.2d 861, 863-64 (6th Cir. 1993); United States v. Haimowitz, 725 F.2d 1561, 1581-82 (11th Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984); United States v. Shields, 675 F.2d 1152, 1156-57 (11th Cir. 1982), *cert. denied*, 459 U.S. 858 (1982); United States v. Craig, 573 F.2d 455, 475-77 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). 18 U.S.C. § 2511(2)(c) (1988) reads: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electric communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Informants are typically considered acting under color of law when "there is sufficient government involvement." Thomas v. Pearl, 793 F. Supp. 838, 841 (C.D. Ill. 1992), *aff'd*, 998 F.2d 447 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 688 (1994).

89. *See* United States v. Boyd, 833 F. Supp. 1277, 1277 (N.D. Ill. 1993) (granting El Rukn defendants a new trial because the Assistant U.S. Attorney knowingly allowed key witnesses to use illegal drugs, have contact visits involving sexual intercourse, and to have sexually explicit conversations with a paralegal in his office, among other things).

The prosecution then has to decide whether or not to retry the defendant in light of the new limitation. At times, the defendant is released from custody.

90. *See* Arizona v. Fulminante, 499 U.S. 279, 288-89 (1991) (holding that at times a coerced confession can constitute harmless error); White, *supra* note 20, at 103 (discussing framework for analyzing due process violations arising out of informant misconduct).

tort action,[91] a federal civil rights action under 42 U.S.C. § 1983,[92] or an action under the Federal Tort Claims Act (FTCA).[93] Only in the rarest cases, however, is civil relief reasonably obtainable because the court may find no action under color of law (necessary to a § 1983 claim) or no agency relationship (necessary to many state tort claims and the FTCA).[94] The assumption of risk and distancing doctrines also fatally weaken the essential element of proximate cause.

91. This is typically a negligent hiring or entrustment claim. *See, e.g.*, Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981) (plaintiffs claimed government, through wrongful acts of FBI informants and agents, was responsible for their mother's death).

92. 42 U.S.C. § 1983 (1988). This section states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. The statute was originally the first section of the Ku Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871) (current version at 42 U.S.C. § 1983 (1988)).

93. 28 U.S.C. § 2671 *et seq.*; *See, e.g.*, Slagle v. United States, 612 F.2d 1157, 1158 (9th Cir. 1980) (plaintiff brought suit against government after being shot and paralyzed while accompanying a federal drug informant).

94. *See, e.g.*, Beard v. O'Neal, 728 F.2d 894, 899-900 (7th Cir. 1984) (informant is not liable for witnessing, but failing to prevent, a crime), *cert. denied*, 469 U.S. 825 (1984); Bond v. Asiala, 704 F.2d 309, 312 (6th Cir. 1983) (court remanded for determination of imposition of liability for police negligence); *Slagle*, 612 F.2d at 1163 (government not liable for informant's acts); Hampton v. Hanrahan, 600 F.2d 600, 625 (7th Cir. 1979) (informant liable for conspiracy to violate civil rights arising out of the raid and murders at the apartment of several Black Panther Party members), *rev'd in part*, 446 U.S. 754 (1980); Coffy v. Multi-County Narcotics Bureau, 600 F.2d 570, 579 (6th Cir. 1979) (use of undercover investigative techniques and procedures by drug agents were proper police activities); Brown v. State's Attorney, 783 F. Supp. 1149, 1154 (N.D. Ill. 1992) (government not liable unless an official policy caused the asserted constitutional violation); Matje v. Leis, 571 F. Supp. 918, 927 (S.D. Ohio 1983) (improper investigative tactics under color of state law precluded good faith immunity); Bergman v. United States, 551 F. Supp. 407, 411-13 (W.D. Mich. 1982).

This is due to a number of factors including the nature of the investigation. For instance, in the El Rukn situation the defendants were charged with serious drug offenses and linked to the El Rukn "gang," neither of which would garner much sympathy from a jury. In general, any serious crime suspect faces the prospect of a grueling civil trial. *Cf.* Wilson v. City of Chicago, 6 F.3d 1233, 1236 (7th Cir. 1993) (murder suspect claimed police tortured him).

Further, a large number of these complaints come in First Amendment challenges to the infiltration of legitimate political organizations. *See, e.g.*, Hobson v. Wilson, 737 F.2d 1, 13 (D.C. Cir. 1984) (plaintiffs claim unreasonable government interference in First Amendment rights), *cert. denied sub nom.* Brennan v. Hobson, 470 U.S. 1084 (1985); Ghandi v. Police Dep't of Detroit, 823 F.2d 959, 963-64 (6th Cir. 1987) (affirming the involuntary dismissal of FBI agents and informant where the informant was instructed to maintain a passive, legitimate role as an unpaid information-gathering informant, but did more), *cert. denied sub nom.* Ghandhi v. Fayed, 484 U.S. 1042 (1988).

These doctrines are also incorporated in other areas of the legal process, usually to the benefit of the informant and handler. Judges rely upon the prosecution when evaluating informants as witnesses or deciding whether to reduce charges, to reduce a sentence, or otherwise to benefit a charged or convicted informant.[95] Similarly, juries generally identify informants with the prosecution and the truth-seeking process. For example, the prosecution will make a "deal" with the informant to collect information and testify in exchange for benefits. Many informants, however, will lie and state that they have not been promised anything because they have not yet received any benefit (i.e., the benefit will arise after the informant's testimony when the prosecution advises the court of an informant's cooperation at a subsequent sentencing).[96] Thus, a court's unwillingness to seriously inquire into the informant-handler relationship allows both the handler and the informant to misrepresent or mischaracterize facts.[97]

A. The Assumption of Risk Doctrine

The thrust of the assumption of risk doctrine is the principle that the Constitution will not protect individuals who unknowingly divulge incriminating information to informants or undercover law enforcement officials. In *Gouled v. United States*,[98] a federal informant and business acquaintance met with the defendant under the pretense of a social visit.[99] Left alone in the office, the informant seized and carried away several documents.[100] The Court found the search and seizure unconstitutional and refused to distinguish the surreptitious act of the informant from that of a law enforcement officer due to the pre-existing relationship between the defendant and the informant.[101] Over the next half century, the Court whittled away at *Gouled* until the holding no longer had any substance.

In *On Lee v. United States*,[102] the Court found no Fourth Amendment violation where a wired informant, a former employee of the defendant, engaged On Lee in conversation.[103] On Lee made several

95. GRAND JURY REPORT, *supra* note 15, at 123.

96. *Id.* at 84. The Grand Jury also documented instances where other law enforcement officials actually told informants to deny any benefits. *Id.* at 89 n.33.

97. *Id.* at 19. *See supra* notes 77-83 and accompanying text (on informant rewards); *infra* notes 329-333 and accompanying text (on informant motivations).

98. 255 U.S. 298 (1921).

99. *Id.* at 1304.

100. *Id.*

101. *Id.* at 304-06; Lewis v. United States, 385 U.S. 206, 210 (1966).

102. 343 U.S. 747 (1952).

103. *Id.* at 754.

incriminating statements.[104] The Court held the informant's actions constitutional because the informant entered with On Lee's consent and no trespass occurred.[105] The Court narrowed *Gouled*, by ruling that only the search, and not the entry, would receive constitutional protection.[106] The Court specifically relied on the "connivance" of one of the parties to the conversation as removing any constitutional taint.[107]

Next, in *Lopez v. United States*,[108] the Court found no Fourth Amendment violation where a government agent surreptitiously taped a conversation.[109] Lopez offered a federal agent a bribe.[110] After this first encounter, the agent returned with a recording device.[111] The agent went along with the scheme to elicit incriminating statements.[112] The Court distinguished *Gouled* because nothing was taken "surreptitiously without [Lopez's] knowledge," only statements that he should have known could be used against him.[113]

Two cases decided on the same day in 1966 further articulated the assumption of risk doctrine. In *Lewis v. United States*,[114] a federal undercover agent telephoned Lewis, misrepresented himself, and told Lewis that a mutual friend said Lewis could sell him drugs.[115] Lewis agreed and directed the agent to Lewis' home where the sale took place.[116] The Court found no Fourth Amendment violation in the home entry because Lewis invited the agent into his house for the express "purposes contemplated by the occupant."[117] Furthermore, the agent only removed the drugs as agreed.[118]

In *Hoffa v. United States*,[119] the Court upheld the placement of an informant in Jimmy Hoffa's entourage while he was on trial in Nash-

104. *Id.* at 749.
105. *Id.* at 751-52.
106. *Id.* at 751.
107. *Id.* at 754. *See* Olmstead v. United States, 277 U.S. 438 (1928) (telephone wiretap is not search due to absence of physical entry into the defendant's home or office); Stone, *supra* note 20, at 1221.
108. 373 U.S. 427 (1963).
109. *Id.* at 438.
110. *Id.* at 430.
111. *Id.*
112. *Id.* at 431.
113. *Id.* at 438; *id.* at 465-66 (Brennan, J., dissenting) (agreeing on assumption of risk).
114. 385 U.S. 206 (1966).
115. *Id.* at 207.
116. *Id.*
117. *Id.* at 211.
118. *Id.* at 210-13.
119. 385 U.S. 293 (1966).

ville.[120] The informant, a Teamsters official, was privy to many meetings and conversations, including discussions regarding jury tampering.[121] The informant duly reported the information to the federal authorities.[122] In exchange, the informant's wife received $1,200 from the government and the informant's pending state and federal charges against him were dropped.[123] A plurality of the Court found no Fourth Amendment violation because Hoffa invited the informant into his suite and Hoffa simply misplaced his confidence in the informant.[124] The majority and dissent both agreed that this type of informant use was vital to the effective functioning of our criminal justice system.[125] In dissent, however, Chief Justice Warren stated that the government would not tolerate a criminal defendant's comparable tactics against the government.[126]

120. *Id.* at 303.

121. *Id.* at 317.

122. *Id.*

123. *Id.* at 298. The government obtained a release for Edward Partin, a Teamster official who was under indictment in Louisiana, and sent him to Nashville to join, observe, and listen as Hoffa was on trial. *Id.* at 317 (Warren, C.J., dissenting). Partin desperately wanted to get out of jail and, according to the affidavit of his cellmate in Louisiana, concocted a story about his close ties to Hoffa in order to obtain release. Partin insisted to his cellmate that he could "fix it up" if he did not obtain enough information from Hoffa. *Id.* at 318 n.2. Clearly, Partin was acting solely out of self-interest and did not care about sacrificing Hoffa. He stated, "I'm thinking about myself. . . . I don't give a damn about Hoffa." *Id.*

As a result of the federal officials' desire to get Hoffa at any cost, Partin's bail was reduced from $50,000 to $5,000 and he was released. *Id.* at 319. Partin was "well paid" through payments to his wife and promises not to pursue the indictments. *Id.* Compare the similarity of this with the Los Angeles Jailhouse scandal. *Supra* notes 15-61 and accompanying text.

124. *Hoffa*, 385 U.S. at 302.

125. *Id.* at 311 (Stewart, J.,); *id.* at 315 (Warren, C.J., dissenting). Chief Justice Warren distinguished *Hoffa* from *Lewis* and Osborn v. United States, 385 U.S. 323 (1966). *Hoffa*, 385 U.S. at 314-21. In *Osborn*, a police officer had been approached by Osborn to bribe a relative of the officer who was on the jury. *Osborn*, 385 U.S. at 316-17. The authorities employed the officer to confirm the conversations and protect the officer's credibility. *Id.* In contrast, Chief Justice Warren believed that Partin had overstepped his limited potential role as an informant because of his background and the obscure nature of the mission the authorities had in mind. *Id.* at 320-21 (This situation contains "a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his testimony."). *Id.* at 320.

The majority placed weight on the cross-examination and jury instructions to address any motivation on Partin's part to lie. *Id.* at 311. Partin was cross-examined for a week, the defense was given wide latitude in cross examination, and the judge specifically instructed the jury on the defense theory. *Id.* at 312 nn.12 & 13.

126. "Certainly if a criminal defendant insinuated his informer into the prosecution's camp in this manner he would be guilty of obstructing justice." *Id.* at 321.

Next, in *Katz v. United States*,[127] the Court reviewed whether the police had violated the Fourth Amendment by placing a warrantless listening device on a public telephone.[128] The Court found a Fourth Amendment violation because "what [the defendant] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[129] This decision, however, appears not to limit the conduct of informants.

In *United States v. White*,[130] a majority of the Court held that while the Fourth Amendment specifically controls the recording of conversations by informants, this same constitutional protection does not extend to the use of informants in general.[131]

> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . [I]f he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other.[132]

Therefore, the full influence of the assumption of risk doctrine insulates the police informant while the police themselves are unprotected. The government can actively place informants, in the name of law enforcement, into situations solely at the risk of the target. Further application of the assumption of risk theory to situations where companies turned over customer records to the government signals the complete erosion of *Gouled*.[133]

B. Informant Misconduct in the Criminal Cases

In criminal cases, courts typically encounter challenges to the use of informants in suppression hearings regarding warrants or confessions. Court analysis generally focuses on the defendant (not the informant), the constitutional right at issue, and the relief requested. These foci insulate the law enforcement arrangement with the informant, avoid consideration of the linkage between the two, and offer no

127. 389 U.S. 347 (1967).
128. *Id.* at 348-49.
129. *Id.* at 351.
130. 401 U.S. 745 (1971).
131. *Id.* at 753 (White, J., writing for four members of the Court); *id.* at 787 (Harlan, J., agreeing on only this point).
132. *Id.* at 752.
133. Smith v. Maryland, 442 U.S. 735 (1979) (telephone company); United States v. New York Tel. Co., 434 U.S. 159 (1977) (telephone company); United States v. Miller, 425 U.S. 435 (1976) (bank); California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974) (bank); *see also* United States v. Jacobsen, 466 U.S. 109, 117 (1984).

recognition of, insight into, or relief from the broader problems of informant misconduct and mishandling.

The constitutional claims raised in cases involving informant misconduct and mishandling include violations of the right to due process under the Fifth or Fourteenth Amendment,[134] and the right to counsel under the Sixth Amendment.[135] In instances of extremely outrageous conduct on the part of the informant, the individual may obtain reversal of the conviction.[136] However, even when the doctrinal approach addresses questionable informant tactics, the courts almost never question or analyze the systemic use of informants.[137] An in-depth review of two particular areas, jailhouse confessions and entrapment or set-ups, confirms these findings.

1. Jailhouse Confessions

In general, active deliberate solicitation of statements relating to pending charges is not constitutionally permissible. An agent, however, may passively listen to obtain spontaneous statements about pending charges. Even within this framework, courts defer to law enforcement and distinguish between informants and law enforcement. Several particular factors are at issue in determining the constitutionality of a jailhouse confession: (1) whether the right to counsel has attached (Sixth Amendment); (2) whether the informant actively or passively interacted with the defendant (Fifth and Sixth Amendments); and (3) whether the discussion was coercive (Fifth and Fourteenth Amendments).

The Sixth Amendment right to counsel, once it has attached, prohibits the State from denying the accused the ability to consult with counsel prior to making an incriminating statement. In *Massiah v.*

134. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Hoffa v. United States, 385 U.S. 293 at 303-04, 310-12 (1966); Giglio v. United States, 405 U.S. 150 (1972). *See generally* White, *supra* note 20.

135. *See, e.g.*, *Hoffa*, 385 U.S. at 304-10. *See generally* Tomkovicz, *supra* note 20; Lundstrom, *supra* note; 20 LURIE, *supra* note 20.

136. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991); *Brady*, 373 U.S. 89; Roviaro v. United States, 353 U.S. 53. *See also infra* notes 207-231 and accompanying text (cases on outrageousness).

137. Courts, essentially, pay lip service to accountability for informants: "The Government cannot disown [an informer] and insist it is not responsible for his actions. . . . The Government cannot make such use of an informer and then claim disassociation through ignorance." Sherman v. United States, 356 U.S. 369, 373-75 (1958). "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady*, 373 U.S. at 87.

United States,[138] the Court held that the Sixth Amendment right to counsel was violated when, post-indictment, an informant engaged Massiah in a conversation during which he made several incriminating comments.[139] The questioning, simultaneously overheard by law enforcement, violated Massiah's right to have counsel present during an interrogation.[140]

Later, in *Brewer v. Williams*,[141] the Court clarified when this Sixth Amendment right was triggered.[142] Williams was questioned by police after he had been arraigned on an outstanding arrest warrant.[143] The Court held that the right to counsel is implicated "at or after the time that judicial proceedings have been initiated."[144]

This protection allows the accused to see a lawyer once requested and prevents law enforcement from actively extracting a confession from the accused.[145] It does not matter whether the defendant is released on bail or is in custody pending trial.[146] In *United States v. Henry*, the Court held that the deliberate elicitation of statements from Henry, while he was in jail awaiting trial, violated his right to counsel.[147] Although the informant was instructed not to question Henry, the Court found that making the informant's payment contingent upon receipt of the information induced more active solicitation than the Constitution can tolerate.[148]

The holding in *Henry* focuses largely on the intentions of the informant. Thus, in *Maine v. Moulton*,[149] the Court held that an informant's active discussions of defense strategy violated the defendant's Sixth Amendment rights.[150] There, the State violated Moulton's rights by wiring his co-defendant for a meeting where the express purpose was to discuss trial defense strategy.[151]

138. 377 U.S. 201 (1964).
139. *Id.* at 205-06.
140. *Id.*
141. 430 U.S. 387 (1977).
142. *Id.* at 398.
143. *Id.* at 392-93.
144. *Id.* at 398.
145. Spano v. New York, 360 U.S. 315 (1959); *Massiah*, 377 U.S. 201.
146. United States v. Henry, 447 U.S. 264 (1980).
147. *Id.* at 274.
148. *Id.* at 268-70.
149. 474 U.S. 159 (1985).
150. *Id.* at 176-77.
151. *Id.* Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating

The Court has limited the right to counsel through the development of several exceptions. In *Kuhlmann v. Wilson*,[152] an informant was placed in the defendant's cell for the purpose of listening for the names of confederates.[153] Although no such specific statements were made, at trial the prosecution sought to use other statements made by the defendant.[154] The Court held that the conduct did not violate Wilson's right to counsel because the statements were spontaneous and unsolicited, and because the informant was instructed not to ask any questions.[155] The Court held that, for a constitutional violation to exist, the agent must go beyond mere listening, and must deliberately attempt to elicit statements.[156]

Sixth Amendment protection was further eroded in subsequent decisions that allowed informants to intrude into discussions between a defendant and counsel.[157] In *Weatherford v. Bursey*,[158] the Court held that informant attendance at meetings between the defendant and counsel violates neither the Sixth Amendment right to counsel, nor the Fourteenth Amendment Due Process Clause.[159] The Court stated that no constitutional violation occurs if the attendance was not for the purpose of seeking information, the informant did not ask questions, the informant did not relay information to the government

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statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent. *Id.* at 176. Prior to *Moulton*, the Court had rejected similar arguments about uncharged crimes in Hoffa where the informant's purpose was to gather incriminating information about a crime other than the pending charges. *See also* Illinois v. Perkins, 496 U.S. 292 (1991) (Miranda warnings not necessary where the suspect spoke with an agent about non-pending charges).

152. 477 U.S. 436 (1986).

153. *Id.* at 439.

154. *Id.* at 440.

155. *Id.* at 440.

156. *Id.* at 459.

157. *See, e.g.*, United States v. Kelly, 790 F.2d 130 (D.C. Cir. 1986) (ABSCAM defendant challenged use of FBI informant to invade meeting with defense counsel and steal defense related documents including a list of witnesses); *see also* GRAND JURY REPORT, *supra* note 15, at 41-42 (because of problems with jailhouse informants many defense attorneys do not give defendants materials, which the wrong person could use to fabricate a confession; this hinders trial preparation, burdens the Sixth Amendment right to counsel, and fosters a lack of trust in the defendant); Philip Halpern, *Government Intrusion into the Attorney-Client Relationship: An Interest Analysis of Rights and Remedies*, 32 BUFF. L. REV. 127, 153 (1983); Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1147 (1984); Lurie, *supra* note 20, at 795; Comment, *The Sixth Amendment Implications of a Government Informer's Presence at Defense Meetings*, 9 U. DAYTON L. REV. 535, 535 (1984).

158. 429 U.S. 545 (1977).

159. *Id.* at 558.

handlers, the attendance was only to maintain the informant's cover, and no identifiable prejudice resulted.[160]

Bursey and Weatherford were charged with vandalizing a selective service office in South Carolina.[161] Unbeknownst to Bursey, Weatherford was an informant working with the police and had given the police information leading to their arrests.[162] After release on bond, each hired separate counsel.[163] At Bursey's invitation, Weatherford attended two meetings between Bursey and his attorney.[164] On the day of trial, when the prosecutor decided to use Weatherford as a witness, Bursey learned that Weatherford was an informant.[165]

The Supreme Court refused to impose a bright line test regarding meetings between a defendant and counsel attended by an informant.[166] However, the Court did outline circumstances which would require greater scrutiny: if Weatherford had testified regarding the conversations, if any State's evidence came from the conversations, if the statements had been used in any manner detrimental to Bursey, or if the prosecution had learned of the conversations.[167] The Court rejected the argument that any information reported by Weatherford would have been inherently detrimental.[168] The Court found no inherent detriment from an informant reporting to the prosecution because "[t]hough imaginative, this reasoning *is not a realistic assessment of the relationship between Weatherford and the prosecuting staff.*"[169] The Court, however, wholly credited the necessity of maintaining Weatherford as an undercover informant for other assignments and did not balance the interests at issue.[170] The Court relied on the as-

160. *Id.* at 556-58.

161. *Id.* at 547.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 547-49 (Weatherford had been seen in the company of police, thus his effectiveness as an informant had diminished).

166. *Id.*

167. *Id.* at 554. Here, the Court specifically held that Black v. United States, 385 U.S. 26 (1966), and O'Brien v. United States, 386 U.S. 345 (1967), did not support a bright line test, although both found surreptitious electronic surveillance of meetings with counsel in violation of the Fourth Amendment. *Id.* at 552. In addition, the Court drew on the lack of any constitutional violation in *Hoffa*. *Id.*; *see supra* notes 119-126.

168. *Weatherford*, 429 U.S. at 554.

169. *Id.* at 556.

170. Because of the assumption of risk, the Court reasoned, the bright line test of the court of appeals would "cloud" the conviction if Weatherford had attended the meeting, Bursey's attorney was suspicious, and as a result "the conversation was confined to the weather or other harmless subjects." The Court also rejected the *Brady* claim and the court of appeals' view that Bursey was "lulled . . . into a false sense of security" and denied

sumption of risk doctrine and stated that Bursey assumed the risk of inviting an informant to the meeting.[171]

In dissent, Justice Marshall found sufficient prejudice in Weatherford's knowledge.[172] Marshall stated that this would most probably affect his testimony and give him an ability to formulate answers to meet expected defenses.[173] He criticized the majority for not assuming that the prosecution gained insight from the meetings and learned Bursey's defense strategies.[174] "Weatherford's acquiescence when told of the prosecutor's decision to use him as a witness meant that the defense did not suspect Weatherford or have any damaging information about him."[175]

Even if informant questioning is coercive, active, and about charged crimes, the confessions could be harmless error. The Court, in *Arizona v. Fulminante*,[176] analyzed the coerced confessions under the Fifth Amendment.[177] The Court had three distinct 5-4 holdings with varying coalitions of justices.[178]

First, writing for a 5-4 majority, Justice White affirmed the Arizona Supreme Court's reversal of the sentence because the confession was coerced in light of the totality of the circumstances.[179] Second,

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the opportunity to consider plea bargaining, investigate Weatherford's background, and prepare to meet his testimony. The Court deferred to the prosecution's hesitation to use Weatherford and to concerns that, once identified, many informants will not want to be confronted and will disappear before trial.

171. *Id.* at 554.

172. *Id.* at 564 n.1.

173. *Id.* at 552.

174. *Id.* at 564.

175. The Court found no inherent detriment from an informant reporting to the prosecution because "[t]hough imaginative, this reasoning is not a realistic assessment of the relationship between Weatherford and the prosecuting staff." The Court, however, wholly credited the necessity of maintaining Weatherford as an undercover informant for other assignments and did not balance the interests at issue. *Id.* at 565 n.4.

176. 499 U.S. 279 (1991).

177. *Id.* at 286-88.

178. *Id.* at 281.

179. *Fulminante*, 499 U.S. at 286-88. In particular, the circumstances of the conversations resulted in the finding of coercion. Fulminante was in danger of physical harm from other prisoners because he was an alleged child murderer. *Id.* Sarivola knew that Fulminante had received rough treatment. Using this knowledge, Sarivola offered protection in exchange for a confession. *Id.* In response to these circumstances, Fulminante confessed. *Id.* at 609. Further, the Court noted that additional factors, not relied on by the state court below, supported the conclusion of coercion as well, including Fulminante's low intelligence, lack of education, short height, slight build, and prior psychological problems in prison, as well as Sarivola's friendship. *Id.*, 499 U.S. at 286 n.2; *see also* GRAND JURY REPORT, *supra* note 15, at 31 (susceptibilities of naive or less astute are an "enticing opportunity to a wily informant").

Chief Justice Rehnquist, writing for a 5-4 majority, held that the harmless error rule applies to coerced confessions and that Fulminante's circumstances were subject to harmless error analysis.[180] Third, Justice White wrote the 5-4 majority opinion that applied the harmless error rule, affirmed that a new trial was necessary, and excluded the confession to the informant, Sarivola.[181]

In this latter holding, Justice White raised concerns over the potential untruthfulness of the coerced confession and the considerable doubt surrounding Sarivola.[182] Sarivola had worked for organized crime while a uniformed officer.[183] He was overzealous in gathering information for which he was paid; he admitted that he had previously fabricated a tape recording while an informant in a FBI investigation where he had received immunity with respect to the information provided.[184] His desire to be in the witness protection program established a motive for giving detailed information regardless of the truth.[185] He only recalled details of the confession from Fulminante a year later, and only then recalled a second confession to his fiancee.[186]

180. *Fulminante*, 499 U.S. at 307-11. Justice Kennedy separately concurred with Chief Justice Rehnquist out of concern on this last point. *Id.* at 313. "If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case." *Id.*

181. *Id.* at 282-88. Justice Kennedy voted that the harmless error doctrine applies to coerced confessions (Kennedy, J., concurring), *Id.* at 313. The majority found that the confession in this case was the result of coercion and that the confession was not harmless error. *Id.* at 302

182. [S]ome coerced confessions may be untrustworthy. Consequently, admission of coerced confessions may distort the truth-seeking function of the trial upon which the majority focuses . . . . More importantly, however, the use of coerced confession, "whether true or false," is forbidden "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." This reflects the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," as well as "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

Id. at 293 (citations omitted).

183. *Id.* at 299 n.9.

184. *Id.*

185. *Id.*

186. *Id.* at 299 & n.9. The second confession allegedly occurred while Sarivola and his then-fiancee picked up Fulminante after his release. *Id.* at 298. Allegedly in response to a question about why Fulminante wanted to go to Pennsylvania instead of Arizona, Fulminante confessed the brutal slaying to Donna Sarivola whom he had just met. *Id.* Although

In exchange for the information, Sarivola received a multitude of benefits, including monetary payments, immunity from prosecution, and placement in the witness protection program.[187]

These cases demonstrate that while the Court prohibits the most egregious mishandling, the assumption of risk doctrine supports and encourages the nearly unlimited use of informants. The Court's opinions allow the handler to be distanced from the informant's conduct. Therefore, the handler's misuse of informants will not be penalized or questioned.[188] Meanwhile, the lines drawn by the court remain unclear.[189]

The courts need to impose meaningful and effective control on jailhouse informant misconduct. For example, Justice White's concern regarding Sarivola's credibility did not include the coextensive influence of the reward upon the finder of fact, nor upon the prosecutor who influenced the finder of fact.[190] Nor did the Court address the

"disgusted" by both the confession and Fulminante, Donna Sarivola did not report the information to authorities. *Id.*

Further credibility concerns arise because Sarivola did not report the presence of Donna to the FBI, nor did he report the second confession for more than a year. *Id.* at 297 & n.8. At that time, Sarivola asked Donna if she would discuss the second confession with authorities. *Id.* at 298.

187. *Id.* at 299 n.9. Donna Sarivola was also placed in the Witness Protection Program. Despite mention, these concerns never entered into the Court's decision. *See* White, *supra* note 20, at 104.

188. Kuhlmann v. Wilson, 477 U.S. 436, 459-60 (1986) (although the handler instructed the informant only to listen and not ask questions, the informant did tell the defendant that his story "didn't sound too good"); United States v. Henry, 447 U.S. 264, 271 & n.9 (1980) (the listening device "has no capability of leading the conversation into any particular subject or prompting any particular replies"); *see also* White, *supra* note 20, at 105 (describing passive/active distinction as "problematic").

189. Tomkovicz, *supra* note 20, at 77-79 (noting lack of clarity concerning the word "deliberate"). Grand jury testimony in Los Angeles revealed an unwritten policy of placing informants to deliberately obtain information. GRAND JURY REPORT, *supra* note 15, at 59-68. In addition, the deputies testified that they received "no formalized training or instruction on the appropriateness and legality of placing informants to obtain information from other inmates." *Id.* at 59. The investigation revealed the same problem with prosecutors "placing" informants, supplying information upon request and having preparation sessions during which they tell informants vital information to fabricate confessions. *Id.* at 99-101.

190. *Fulminante*, 499 U.S. at 292-95 (White, J., dissenting). Justice White also relied upon *Tumey v. Ohio*, 273 U.S. 510 (1927), where the conviction was reversed because the judge had a financial interest in the outcome, despite absence of evidence that bias influenced the outcome. *Fulminante*, 499 U.S. at 294. *See also* White, *supra* note 20, at 127 (same criticism).

reliability of the cross-examination of Sarivola to illuminate the faults in his role.[191]

2. Informant Set-Ups and Entrapment

Criminal defendants also confront very active informants in the context of the creation of criminal enterprises, criminal activity by the informant, and entrapment. In each of these situations, the informant actively pursues or sets up the defendant with the explicit or implicit approval of the handler. The target raises a Fifth or Fourteenth Amendment due process claim in response. The courts reinforce the uncontrolled use of informants by treating these situations similarly and allowing all but the most extreme and outrageous of informant and handler misconduct to persist.

In *Sorrells v. United States*,[192] a government agent approached Sorrells and gained his confidence through war-related stories and conversation.[193] The agent repeatedly requested illegal whiskey until Sorrells procured some as a favor for a fellow war veteran.[194] The Court held that entrapment exists where the government agents "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission."[195] As such, entrapment is a complete defense to the charges.[196]

In *Sherman v. United States*,[197] the Court held that Sherman was entrapped where an informant presented himself as a recovering addict, claimed to be suffering greatly, and appealed to Sherman to obtain illegal narcotics for him.[198] The government attempted to distance itself from the informant and the claim of entrapment.[199]

191. Justice White noted in detail that absent the admission of the confession to Sarivola, he probably would not testify upon retrial. *Fulminante*, 499 U.S. at 300 (noting that absent the confession, potentially misleading impeachment of Sarivola "would have had no relevance and would have been inadmissible at trial").

Some see the use of impeachment as an effective tool in controlling informants. *See generally* Haglund, *supra* note 20, at 1423. This technique, however, focuses solely on the credibility of the informants and overemphasizes their effectiveness. Previously in *Hoffa*, the Court placed great reliance on the value of cross-examination. *Hoffa*, 385 U.S. at 311-12 & nn.12-14.

192. 287 U.S. 435 (1932).

193. *Id.* at 439.

194. *Id.*

195. *Id.*, at 442; *see* Donnelly, *supra* note 5, at 1098-99 (development of entrapment law pre-*Sorrells*); *id.* at 1100-03 (on the theoretical distinction between the majority and minority opinions in *Sorrells*).

196. *Sorrells*, 287 U.S. at 449.

197. 356 U.S. 369 (1958).

198. *Id.* at 373.

199. *Id.*

The Court, however, refused to allow the government to "disown Kalchinian [the informant] and insist it is not responsible for his actions."[200] The Court specifically noted that the government had given the informant incentives regarding pending charges and neglected to monitor his activity.[201]

Recent holdings narrow the entrapment defense. In *United States v. Russell*,[202] the Court held that no entrapment occurred where a government agent supplied chemicals and requested the production of illegal drugs from an on-going operation.[203] The Court held that the agent's provision of the chemical was not determinative because the defendant already produced the drug and had other sources to obtain that chemical.[204] Recent lower court opinions have similarly narrowed the utility of the entrapment defense.[205] Where the government repeatedly attempts to secure criminal activity from an otherwise indisposed individual, however, the defense will be available.[206]

The decisions where a defendant challenges a government informant or agent's conduct as outrageous based on due process ground reflect the distancing of informants from handlers. This defense is typically sought where the defendant concedes predisposition, which renders the defense of entrapment unavailable.[207] Some federal appellate courts have limited the application of this defense to only the rarest of circumstances.[208]

200. *Id.*

201. *Id.* at 374 & n.2.

202. 411 U.S. 423 (1973).

203. *Id.* at 436.

204. *Id.* at 428-29.

205. *See* United States v. Busby, 780 F.2d 804 (9th Cir. 1986) (no entrapment where informant, who had a long history of presenting narcotic crimes to state and federal agencies in exchange for money or favors, struck up a deal for cocaine, approached the FBI but was turned down, then approached the local police and was accepted).

206. *See* Jacobson v. United States, 112 S. Ct. 1535 (1992) (government repeatedly sent unsolicited catalog of child pornography); United States v. Skarie, 971 F.2d 317 (9th Cir. 1992) (defendant only committed crime after repeated threats by informant).

207. *See* Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell and Blackmun, JJ., concurring); *id.* at 497 (Brennan, Stewart, and Marshall, JJ., dissenting) (government provided drugs used in sale); *Russell*, 411 U.S. at 432-33 (citing Rochin v. California, 342 U.S. 165 (1952)).

208. *See* United States v. Mosley, 965 F.2d 906, 911 (10th Cir. 1992) (collecting few cases finding outrageous conduct); United States v. Leja, 563 F.2d 244, 246 n.4 (6th Cir. 1977) (difficult to prove police involvement outrageous in contraband cases); *cert. denied*, 434 U.S. 1074 (1978); *see also* United States v. Pardue, 983 F.2d 835, 841-42 (8th Cir. 1993) (not outrageous where government concocts particulars of murder-for-hire scheme), *cert. denied*, 113 S. Ct. 3043 (1993); United States v. Valdovinos-Valdovinos, 743 F.2d 1436, 1437 (9th Cir. 1984) (per curiam) (holding that government creation of immigration crimes by

Several distinct instances of outrageous governmental conduct can result in a constitutional violation. First, a due process violation will occur where the government utilizes unwarranted physical or mental coercion that results in a crime.[209] Government agents, however, can act in any manner consistent with the type of criminal activity under investigation. Thus, if drug dealers ordinarily hold out large sums of money and make threats in order to do business, then courts will not find a due process violation where informants or law enforcement officials act similarly.[210] Further, conduct such as sexual involvement with the target is not actionable and is treated as an assumption of risk.[211]

Second, law enforcement's complete fabrication of the crime to secure the arrest and conviction will violate the target's due process rights. For example, in *United States v. Twigg*,[212] the informant contacted one defendant, suggested setting up a lab to produce methamphetamine hydrochloride (speed), and assigned tasks to the defendants.[213] One defendant was to procure the money to set up a speed lab, the other was brought in to assist.[214] The informant set up the lab with significant assistance from the Drug Enforcement Administration, including the purchase of the essential ingredient and twenty percent of the glassware, the rental of a farmhouse for production, and the arrangement of chemical supply houses to facilitate the purchase of the remaining supplies.[215]

Third, a due process violation exists where the government conduct is extremely outrageous. Here, the typical court approach reflects a melding of the entrapment and outrageousness defenses. As in entrapment, agents and informants can act in the same way as any

posing as employer and asking for illegal immigrants without proper papers was outrageous because the transporter had no standing to raise defense), *cert. denied*, 469 U.S. 1114 (1984). *But see* United States v. Twigg, 588 F.2d 373, 385-89 (3d Cir. 1978) (Adams, J., dissenting) (reading Hampton v. United States, 425 U.S. 484 (1976) to disallow the defense); United States v. Kelly, 707 F.2d 1460, 1475-76 (D.C. Cir. 1983) (Ginsburg, J., concurring) (citing Judge Adams' dissent in *Twigg* for the concept that the due process analysis cannot change the entrapment defense).

209. *See* United States v. Mosley, 965 F.2d 906, 912 (10th Cir. 1992); United States v. Simpson, 813 F.2d 1462, 1466 (9th Cir. 1987) (need brutality and coercion).

210. United States v. Emmert, 829 F.2d 805, 812 (9th Cir. 1987).

211. *See Simpson*, 813 F.2d at 1466.

212. 588 F.2d 373 (3d Cir. 1978).

213. *Id.* at 375.

214. *Id.*

215. *Id.* at 375-76; *see also Mosley*, 965 F.2d at 911-12; Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971) (government agents collaborated with suspect to establish bootlegging operation, then sustained operation as both supplier and sole customer).

other participant in the illegal activity.[216] For example, the ABSCAM defendants presented an entrapment defense based on the outrageousness of the government's conduct in setting up the whole scenario.[217]

This standard effectively separates the conduct of the informant from that of the government handler, and specifically insulates the government from the misconduct by finding that unless the handlers can be actively implicated in the shocking conduct, no due process concerns are raised.[218] Two cases, both involving ABSCAM informant Melvin Weinberg, illustrate this point.[219] In these cases, Weinberg testified that he concocted the scheme (that wealthy Arabs needed assistance in gaining permanent residence), established the fee ($25,000 to a member of the House and $50,000 to a member of the Senate), and set the plan in motion.[220] After Weinberg was recorded coaching Senator Williams, United States Attorneys told Weinberg, "at least if you're going to coach him you don't tape it."[221] One district court found the government's conduct outrageous, but the court of appeals disagreed.[222] Then-Judge Ginsburg, writing the majority on this point, noted that the outrageousness argument depends upon the existence of "coercion, violence or brutality to the person."[223]

In this respect, Judge Ginsburg applied a shocks-the-conscience test to any sort of misconduct, whether evidentiary in nature or infecting the entire operation. As a result, the court held that the ABSCAM operation, in the absence of any intrusion, did not result in a denial of due process.[224] Her approach calls into question only the most extreme behavior leaving many seemingly outrageous situations

216. *See, e.g.*, United States v. Brown, 635 F.2d 1207, 1212-13 (6th Cir. 1980) (Agent or informant can engage in criminal activity, supply item of value to criminal enterprise, or "further the interests of the criminal enterprise in some manner to gain the confidence of the criminal elements with which he must deal.").

217. *See, e.g.*, United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983).

218. *See* Tomkovicz, *supra* note 20, at 20-21 & nn.90-91.

219. *Kelly*, 707 F.2d at 1462-63; United States v. Myers, 692 F.2d 823, 830 n.4 (2d Cir. 1982).

220. *Myers*, 692 F.2d at 830 n.4.

221. *Kelly*, 707 F.2d at 1464-65 (Once Kelly was approached and told he would receive $25,000, the contact went back to Weinberg saying that the congressman wanted $250,000. The contact further grossly exaggerated his previous dealings with the representative.); *Myers*, 692 F.2d at 840 (Myers claimed that the other participants coached him as to what to say on video and assured him that he would never be asked to do anything).

222. *Kelly*, 707 F.2d 1460.

223. *Id.* at 1476 (quoting Irvine v. California, 347 U.S. 128, 132-33 (1954)).

224. *Kelly*, 707 F.2d at 1474.

unremediable.[225] This standard becomes even more difficult to surmount in light of the courts' routine deference to law enforcement justifications for their practices.

The difficult outrageousness standard merely adds to the courts' inability to exercise control when needed.[226] One court of appeals stated that government direction of the informant is not questionable unless the government conduct "amount[s] to the 'engineering and direction of [a] criminal enterprise from start to finish.'"[227] Thus, only in cases like *Twigg*, where the government provided or facilitated the procurement of almost all the drug manufacturing supplies and rented the site for the production, will courts find law enforcement participation demonstrably outrageous.[228]

In both entrapment and outrageousness cases much latitude is given to the informant, usually to maintain the cover or confidence of the targets.[229] Courts examine a number of factors in entrapment and

225. *See, e.g.*, United States v. Barrera-Moreno, 951 F.2d 1089 (9th Cir. 1991) (finding informant's buying and selling of cocaine with the defendants was only passively tolerated by the government and reversing the dismissal of the indictments), *cert. denied*, 113 S. Ct. 417 (1992); United States v. Simpson, 813 F.2d 1462, 1465 (9th Cir. 1987) (finding no due process violation where the government informant, a prostitute, was known to be engaging in sexual activity with the suspect prior to the heroin sale for which he was charged); United States v. Alexandro, 675 F.2d 34, 40 (2d Cir. 1982) (requiring bodily invasion), *cert. denied* 459 U.S. 835 (1982); United States v. Bowling, 666 F.2d 1052, 1054 (6th Cir. 1981) (finding no outrageous conduct where government informant suggested out-of-state targets and participated in robberies where charge was interstate transportation of stolen articles), *cert. denied*, 455 U.S. 960 (1982); United States v. Brown, 635 F.2d 1207, 1212-13 (6th Cir. 1980) (same criminal activity as in *Bowling*); Yanez v. Romero, 619 F.2d 851, 855 (10th Cir. 1980) (threat to use catheter for urine sample not shocking), *cert. denied*, 449 U.S. 876 (1980); United States v. VanMaanen, 547 F.2d 50 (8th Cir. 1976) (falsification of police reports, advising witnesses to leave town and failure to disclose existence of informant prior to trial not shocking). For additional support see the cases cited in *Kelly*. 707 F.2d at 1476 n.13 (Ginsburg, J., concurring).

226. The *Myers* court noted that in the decade since *Russell*, *Twigg* was the only decision to find a due process violation. United States v. Myers, 692 F.2d 823, 837 (2nd Cir. 1982).

227. *Barrera-Moreno*, 951 F.2d at 1092 (quoting United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991)). "[P]assive tolerance . . . of a private informant's questionable conduct [is] less egregious than the conscious direction of government agents typically present in outrageous conduct challenges." *Id.* at 1092 (quoting *Simpson*, 813 F.2d at 1468).

228. United States v. Twigg, 588 F.2d 373, 375-76, 380-81 (3d Cir. 1978) (comparing the situation to *Russell*); *see also* Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (reversing conviction where agent was involved for two years in illegal manufacture of alcohol, offering to supply materials, operator and location, and actually supplying sugar at wholesale prices).

229. *See, e.g.*, Jacobson v. United States 112 S. Ct. 1535, 1540 (1992); United States v. Russell, 411 U.S. 423, 432 (1973) (gain confidence); United States v. Bowling, 666 F.2d 1052, 1055 (6th Cir. 1981) (keep credibility and maintain effectiveness). The reliance is drawn, in large part, from the ill-premised notion that informants are vitally necessary to

outrageousness challenges, including the informant conduct, the type of criminal activity targeted, the instigation versus infiltration of the criminal activity, the degree of government direction or control (versus acquiescing in the criminal conduct), and the strength of the connection between the government and the criminal acts committed.[230] The chief concern in both, however, is criminal law enforcement, not responsibility for the informant's mishandling or misconduct.[231]

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deal with crime. *See, e.g.*, United States v. Pfeffer, 901 F.2d 654, 656 (8th Cir. 1990) ("stealth, strategy, or deception"); United States v. McQuin, 612 F.2d 1193, 1195 (9th Cir. 1980) (infiltration of criminal ranks long recognized), *cert. denied* 445 U.S. 954 (1980); *Twigg*, 588 F.2d at 380 (infiltration of criminal enterprises "accepted and necessary"); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978); *see also* Tomkovicz, *supra* note 20, at 74 n.287 (deference to prosecution on the question of agency relationship between informant and government).

In *Twigg*, the government granted the informant, a multiple convicted drug manufacturer who had run 50 to 100 speed laboratories, a reduced sentence in order to convict the defendants. Neither of the defendants had any prior drug manufacturing experience, any apparent criminal designs or any expertise to set up even a single drug laboratory. *Twigg*, 588 F.2d at 381 n.9.

230. United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980). The government can use those tactics and methods present in the criminal world, even furthering the criminal enterprise. In ABSCAM, the defendants attacked the government's use of an admitted con-man as the architect of the scheme. This was rejected as merely the government's use of an expert in the field, with the credibility and contacts necessary to encounter the criminals. United States v. Kelly, 707 F.2d 1460, 1472 (D.C. Cir. 1983).

On criminal activity targeted, *see Brown*, 635 F.2d at 1213 (noting that the infiltration of burglary rings is important to "a more expeditious and thorough investigation"). Drug related crimes are peculiarly acceptable targets for this. Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring); *see also Kelly*, 707 F.2d at 1461.

Instigation crosses the line of permissibility. United States v. Corcione, 592 F.2d 111, 115 (2d Cir. 1979) (facilitation of scheme in progress is permissible), *cert. denied*, 440 U.S. 975 (1979). On government control, *see Russell*, 411 U.S. at 426 n.3; *Brown*, 635 F.2d at 1213; United States v. Spivey, 508 F.2d 146, 151 (10th Cir. 1975), *cert. denied*, 421 U.S. 949 (1975). Finally, the closer the causal relationship, the more likely government has exceeded the permissible bounds of conduct. *Spivey*, 508 F.2d at 150 ("The more immediate the impact of the government's conduct upon the particular defendant, the more vigorously would be applied *Russell*'s test for constitutional impropriety.").

231. In *Brown*, the court expressed this particular concern solely in terms of the quandary facing law enforcement who wanted to catch as many criminals and minimize potential harm to society while attacking a preexisting criminal enterprise. *Brown*, 635 F.2d at 1214 ("They were compelled to decide whether to arrest [the burglars] when their criminality became known or to delay those arrests with the prospect of casting a much larger net, and of eliminating a much broader range of criminality. . . . The difficulty of the problem was exacerbated by the fact that either alternative chosen would result in some harm to society. . . .").

In United States v. York, 830 F.2d 885, 890 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988), the defendants, to support an argument for entrapment, wanted to present evidence that the FBI failed to follow its own guidelines for the hiring, using and monitoring of informants. The court found that evidence indicating that the informant should not have been hired or his use discontinued was irrelevant to show whether the defendants were predisposed to commit the crime. *Id.* Professor Donnelly examined the criminal

C. Treatment of Informants in Civil Litigation

Courts have been equally unwilling to recognize linkages between the informant and law enforcement handlers in civil litigation challenging informant mishandling or misconduct. In this context, courts most often encounter civil rights actions for constitutional violations brought under 42 U.S.C. § 1983 or tort claims brought under the FTCA.[232] The distancing of the informant from the handler in these cases is derived from the assumption of risk doctrine. The distancing of informant and handler also removes a necessary element of proof from the claims, that the violation be under color of law according to § 1983 or, that the violation be a non-discretionary act of an agent or employee of the government under the FTCA. In addition, distancing weakens proximate causation and insulates government officials from accountability or responsibility for the mishandling or misconduct.

1. Weatherford *and Section 1983 Claims*

Under § 1983, a claimant must show a violation of a constitutional or federal right committed by a person acting under color of "any statute, ordinance, regulation, custom or usage, of any State."[233] In the informant situation, the more difficult aspect of proof lies in showing that the informant acted under color of law when inflicting the injury. Courts typically find that an informant acts under color of law only where the informant and government have a close relationship.

Judicial findings for the plaintiffs are usually on the pleadings, where the close relationship is sufficiently pled through handler direc-

liability of informants, particularly in light of entrapment and spying on political organizations. Donnelly, *supra* note 5, at 77.

232. In the civil context, courts also address informants when individuals and organizations challenge law enforcement employment of agent provocateurs to inform, through infiltration or otherwise, on minority political organizations. Since the late 1800's police intelligence units have watched, infiltrated, burglarized, and attempted to sabotage legitimate political organizations that law enforcement agencies perceive as a threat to society. The resulting litigation, while concerned with the individual acts of the provocateurs, typically does not address the informant misconduct or mishandling because the attention is diverted elsewhere.

233. 42 U.S.C. § 1983 (1988); *see* West v. Atkins, 487 U.S. 42, 48 (1988). The one element omitted here, the existence of a constitutional injury, will not be addressed for several reasons. The nature of the injury, whether of constitutional magnitude or deprivation of a federal right, will vary from case to case. Second, the weakness in addressing informants does not lie so much in discounting the injury as it does in a basic misunderstanding of informants. Once informants are treated in a proper context, then any latent difficulties in addressing the nature of the injury can be addressed.

tion of the informant.[234] But even these findings are inconsistent. On a motion to dismiss, one district court presumed an agency relationship between the informant and handler.[235] Another found that the informant was not acting under color of law even though the informant was employed by the defendant police department.[236] Still another found the existence of a conspiracy, including the informant, among private, not public, actors.[237] One court found a duty on the part of handlers to exercise reasonable care, but vacated the district court opinion and remanded for consideration of intervening Supreme Court opinions.[238] Only in the rarest of instances will a court find outrageous informant involvement and government conduct supporting civil liability post-trial.[239] In these circumstances, the courts focus on informant intention and authorization.[240]

In *Weatherford*,[241] Bursey filed suit under § 1983 against Weatherford and his supervisor for violations of the Sixth Amendment right to effective assistance of counsel and the Fourteenth Amendment due process right to a fair trial.[242] The Court did not directly address whether the informant's conduct was under color of law because it found no constitutional violation.[243] The essence of the Court's determination, however, was to distance the prosecutorial handlers from the informant's presence during discussions between Bursey and his counsel.[244] The Court relied heavily upon Bursey's

234. *See, e.g.*, Brown v. State's Attorney, 783 F. Supp. 1149 (N.D. Ill. 1992) (on motion to dismiss, officers directed informant to search and steal); Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984) (on motion to dismiss, police encouraged and monitored); Matje v. Leis, 571 F. Supp. 918 (S.D. Ohio 1983) (on motion to dismiss, drug operative's investigation was authorized); *see also* Bond v. Asiala, 704 F.2d 309 (6th Cir. 1983) (on motion for summary judgment, failure to check informant's information).

235. *Waller*, 584 F. Supp. at 943.

236. Hiser v. City of Bowling Green, No. 3, 93CV7082, slip op. at 3-4 (N.D. Ohio Nov. 8, 1993).

237. Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y. 1979).

238. *Bond*, 704 F.2d at 312, 315 (intervening decisions included Parratt v. Taylor, 451 U.S. 527 (1981), Steagald v. United States, 451 U.S. 204 (1981); Owen v. City of Independence, 455 U.S. 622 (1981)).

239. Hampton v. Hanrahan, 600 F.2d 600, 605 (7th Cir. 1979) (informant infiltrated Black Panther Party and facilitated armed raid and murder of leaders).

240. *Brown*, 783 F. Supp. at 1153-54 (handler direction); *Hampton*, 600 F.2d at 609-613 (integration of informant and handler activities); Waller v. Butkovich, 584 F. Supp. 909, 931-32 (N.D.N.C. 1984) (general encouragement and monitoring); Martje v. Leis, 571 F. Supp. 918, 925 (S.D. Ohio 1983) (compensation).

241. Weatherford v. Bursey, 429 U.S. 545, 556-58; *see supra* text accompanying notes 158-175.

242. *Id.* at 547.

243. *Id.* at 558.

244. *Id.* at 557.

invitation to Weatherford and the latter's compliance to maintain his cover.[245] Also, the Court noted the absence of a prosecutorial purpose and that Weatherford did not directly relay information back to the prosecution.[246] As under the assumption of risk doctrine, it does not matter that the prosecution was aware of the conduct, did not disclose Weatherford's role, and gained indirect insight based upon Weatherford's silence.[247]

In *Ghandi v. Police Department of Detroit*,[248] the Sixth Circuit went to great lengths to minimize the role of the handlers. In this case, plaintiffs challenged the FBI's investigation and infiltration of their organization, the National Caucus of Labor Committees.[249] After the close of plaintiffs' case, the district court granted the defendants' motion for a directed verdict.[250] The persuasive facts were that the informant, a member of the group, approached the FBI to provide information and was instructed "to perform normal surveillance and information gathering" but not any stealing, disruption, or violence.[251] The court of appeals found the only significant factor implicating an informant/handler relationship was that the informant was paid for his work.[252] However, because his payment was contingent on delivery of information, the linkage was not as close as if he were paid a salary. The court also noted that the informant entered the group on his own and that any criminal acts committed were on his own behalf.[253]

245. *Id.*

246. *Weatherford*, 429 U.S. at 556-58.

247. *See supra* notes 167-175 (on Marshall's dissent). The Court accepted the justifications for Weatherford even though the prosecution and police needs of confidentiality evaporated when they nonchalantly "burned" him at trial. Weatherford's continued informant status was dubious and this decision was made prior to trial, but only communicated to the defense at trial. 528 F.2d 483, 485 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977).

248. 823 F.2d 959 (6th Cir. 1987) ("*Ghandi II*").

249. *Id.* at 960.

250. *Id.*

251. *Id.* at 961.

252. *Id.* at 964.

253. *Ghandi*, 823 F.2d at 960, 963-64 & n.5; *see supra* notes 77-83 (on variety of rewards). The court of appeals also affirmed the exclusion of any evidence regarding the informant's background. *Id.* at 962-63 (no manifest injustice resulted from exclusion when plaintiffs failed to include this in the pretrial order). In a prior decision in the same case, the court of appeals reversed entry of summary judgment for the defendants and identified other factors for consideration. In response to the defendants' motion, plaintiffs presented, by affidavit, evidence that the informant was instructed "to suggest provocative actions that were illegal," that certain items were stolen on behalf of the FBI and under FBI instruction, and that the FBI authorized and approved of the informant's actions. *Ghandi v. Police Dept. of Detroit*, 747 F.2d 338, 349-52 (6th Cir. 1984) ("Ghandi I"). The acts allegedly included disruptions of party events, misrepresentations of party positions, theft, running for statewide office, and contriving circumstances to permit an FBI search of

Courts tend to reward handlers who have unspoken, unclear, or non-intrusive goals or motives and vague authorizations or instructions. In other cases, this tolerance for misconduct is more direct. In *Coffy v. Multi-County Narcotics Bureau*,[254] an informant introduced an agent to the plaintiff in a bar for the purpose of establishing drug deals.[255] The plaintiff claimed that the introduction of the informant constituted a "nuisance."[256] The court of appeals found no liability for the informant's drug dealing, and discounted the influence of the informant.[257] The court cited informant use as an example of law enforcement "utiliz[ing] routine undercover investigation techniques to identify and document illegal drug transactions."[258] As further evidence of this discounting, the court found "inconclusive and of no probative value"[259] evidence that the same officer approached an inmate who had frequented the bar, told him that he could get out on probation if he testified, and in response to the inmate's own lack of recollection, told him to "[j]ust make something up."[260] Thus, in the § 1983 case context, the application of the assumption of risk doctrine severs any linkage between handler and informant and nearly completely bars recovery for the resulting misconduct or mishandling.

2. *Federal Tort Claims Act (FTCA) Cases*

The FTCA allows recovery for the negligent acts or omissions of federal employees, but excludes discretionary acts and intentional torts.[261] In cases brought under the FTCA, courts insulate handlers from liability by either finding that the handler had no duty to control the informant, that the informant was not an employee, or that the use of the informant or the informant's acts were discretionary. Here, as with assumption of risk, the onus is on the target while the handler is distanced from the informant.

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plaintiffs' headquarters. The court of appeals held that, if true, these were not mere passive activities, but asserted the informant in illegalities and positions of authority in the organization. Handler liability would exist if they "authorized or approved" the activities. *Id.* at 349-52. The two *Ghandi* opinions illuminate how handlers can react and tailor their conduct and interaction with informants to the assumption of risk doctrine and the court's receptiveness to distancing.

254. 600 F.2d 570 (6th Cir. 1979).
255. *Id.* at 574.
256. *Id.* at 573.
257. *Id.* at 579.
258. *Id.* at 577.
259. *Id.* at 579.
260. *Id.* at 579 n.11.
261. 28 U.S.C. §§ 1346(b), 2680(a), (h).

Civil actions under the FTCA were brought against the United States as a result of Gary Thomas Rowe's conduct as an informant within the Ku Klux Klan.[262] These FTCA claims were unsuccessful in obtaining relief against his handlers.[263] In *Liuzzo v. United States*,[264] the court rejected a claim that the government had a duty to prevent informant crimes.[265] The court was reluctant to impose "a duty on informants to prevent crimes committed in their presence [because that] would go beyond settled principles of tort law and would also have effects on the use of informants."[266] In *Peck v. United States*,[267] the court likewise rejected an argument advocating a common law duty to protect or warn.[268] In other contexts, courts have similarly rejected FTCA claims resulting from an informant's conduct because the handler did not have a duty to instruct an informant to stop a crime and the informant himself had no duty to prevent crimes that occur in the course of collecting information.[269]

In *Peck*, the court also rejected the *respondeat superior* claim and found that the government failed to "direct" Rowe's actions.[270] In *Liuzzo*, the court permitted but weakened a similar challenge to the hiring policy by allowing the negligent hiring claim to the extent that it challenged the implementation, but not formulation, of policy regarding the use of Rowe as an informant.[271] Other claims have been similarly rejected when it was shown that the informant was neither an employee nor an independent contractor.[272] Other courts have also rejected negligent supervision claims because the decision to use the informant was discretionary.[273] The lack of duty, the lack of a formal relationship, and the deference to governmental discretion all operate

262. Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y. 1979); Rowe v. Griffen, 676 F.2d 524 (11th Cir. 1982).

263. *Peck*, 470 F. Supp. at 1020; *Rowe*, 676 F.2d at 529.

264. 508 F. Supp. 923 (E.D. Mich. 1981).

265. *Id.* at 935.

266. *Id.* at 936; *see also* Guccione v. United States, 847 F.2d 1031, 1035 (2d Cir. 1988) (handler had no duty to supervise informant), *cert. denied*, 493 U.S. 1020 (1989).

267. 470 F. Supp. 1003, 1014, 1016-17 (S.D.N.Y. 1979).

268. *Id.* at 1016-17.

269. Beard v. O'Neal, 728 F.2d 894 (7th Cir. 1984) (suit against informant for not preventing murder that he knew was going to happen while investigating a corrupt police officer); Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979) (suit against FBI handler for not reporting criminal acts, including murder, committed by a corrupt police officer and for not instructing O'Neal to prevent serious crimes like murder).

270. *Peck*, 470 F. Supp. at 1014.

271. *Liuzzo v. United States*, 508 F.Supp. 923, 931-32 (E.D. Mich. 1981).

272. *Slagle*, 612 F.2d 1157.

273. Bergmann v. United States, 689 F.2d 789, 794 (8th Cir. 1982) ("it is a policy judgment to do so").

to distance informants from their handlers as part of the assumption of risk doctrine.

3. *Discovery and Other Matters*

Informant issues also arise in other stages of litigation. The Court's approach is consistent with the assumption of risk doctrine and also exhibits a distancing of handlers and their decisions from informants and their conduct.[274] For example, during the discovery phase in *Socialist Workers Party v. Attorney General*,[275] a civil action brought against the FBI for its investigation, infiltration and disruption of the Socialist Workers Party, the plaintiffs sought files on informants used by the FBI in its operations.[276] The government disclosed that 1,300 informants had provided information about the plaintiffs and that 300 informants were actually members of the plaintiff organizations.[277] The government also provided the files of eight informants whose identities were disclosed, but refused to provide the plaintiffs with an additional eighteen files on informants whose identities were not yet disclosed.[278] The district court held the attorney general in contempt for failing to provide the files and sought a writ of mandamus from the court of appeals.[279]

The Attorney General argued that revealing the identity of the informants would severely undermine the FBI's ability to recruit, maintain, and use informants.[280] In granting the writ and vacating the

274. Many of these occur in challenges to "red squad" activities, where police infiltrated and disrupted political organizations. For a complete history of red squad activity in this country, *see* DONNER, *supra* note 38. *See also In re* United States, 872 F.2d 472 (D.C. Cir. 1989) (government infiltrated Communist Party and planted "snitch file" giving appearance that member was an informant), *cert. denied*, 493 U.S. 960 (1990); Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) (First Amendment challenge to FBI's COINTELPRO investigation and infiltration in District of Columbia metropolitan area); Black Panther Party v. Smith, 661 F.2d 1243 (D.C. Cir. 1981) (challenge to COINTELPRO operations against Black Panther Party); United Klans of Am. v. McGovern, 621 F.2d 152 (5th Cir. 1980) (challenge to COINTELPRO operations against Ku Klux Klan); Wahad v. Federal Bureau of Investigation, 813 F. Supp. 224 (S.D.N.Y. 1993) (challenge to FBI monitoring of Black Panther Party member in prison).

275. 596 F.2d 58 (2d Cir. 1979).

276. *Id.* at 60.

277. *Id.*

278. *Id.* at 60 & n.1.

279. *Id.*

280. *Id.* at 64 n.11 ("significantly detrimental effect on law enforcement by undermining the pledge of confidentiality which the FBI makes to informants"). Here, the court also noted that other informants would see this action, decide that the "United States would not or could not continue to honor the pledge of confidentiality" and therefore be unable "to attract and maintain sources or information." *Id.*

district court's order, the court of appeals deferred to concerns regarding informant use despite the gross disparity between the numbers of informants used and those whose files were sought.[281] Similarly, the court downplayed the Attorney General's intentional non-compliance with a court order, and found that holding the attorney general in contempt "warrants more sensitive judicial scrutiny."[282]

To preserve confidentiality, the FBI had been willing to concede a presumption that any damages provable were the result of informant conduct.[283] Rather than impose that admission, the court of appeals instructed the district court to review the files and present plaintiffs with general information, including the numbers of informants and the areas of their activities.[284]

Another opportunity to examine the government's relationship with Gary Thomas Rowe arose in *Rowe v. Griffin*.[285] Rowe had agreed to testify against two Klansmen responsible for the murder of Viola Liuzzo in exchange for immunity from prosecution for her murder.[286] Rowe asserted that he was in the car, but did not fire a weapon.[287] Evidence later surfaced that Rowe may have lied.[288] He was subsequently indicted for the Liuzzo murder.[289] Rowe filed suit to enjoin the state court prosecution based upon the immunity agreement.[290] The court of appeals deferred to the government, discounting Rowe's misconduct as a basis for overturning the prior agreement.[291] As to Rowe's candor, the court stated, "[t]he only evidence in the record going to Rowe's lack of good faith is testimony indicating that Rowe perjured himself when he testified before the state grand jury and in the state trials."[292]

281. *Id.* at 60.

282. *Id.* at 64-65 ("Courts accordingly owe him respect as an official and, absent an abuse of power or misuse of office, the most careful and reasoned treatment as party or as litigant.").

283. *Id.* at 66.

284. *Id.* at 66-67 (method of recruitment, affiliated organizations, methods of obtaining information from the plaintiffs, topics reported on, personal information reported on, documents copied, and photographed political events, voted in plaintiffs' elections and compensation); *id.* at 68-70 (Appendix with sample representative findings for district court).

285. 676 F.2d 524 (11th Cir. 1982).

286. *Id.* at 525.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 528.

292. *Id.* at 525, 528.

Eminently clear from the civil court decisions on informants is that courts are unwilling to critically examine informant-handler relationships. Further, the decisions in *Bursey*, *Ghandi*, *Peck*, *Socialist Worker Party*, and *Rowe* reflect little understanding of the workings, use, and motivation of informants. By considering the underlying roles, usages, and general nature of informants, courts can strike a more realistic balance in the interests at stake.

IV. Suggestions for Reform of Informant Handling

The current critiques of informant control typically focus on two elements. The first critique charges that the Court's assumption of risk doctrine is ill-conceived and should be abandoned. The second critique contends that the alternative to assumption of risk is to maintain or strengthen particular constitutional rights violated by the informant conduct. This rights-based approach[293] is well intentioned, but does not critically explore the basic decision by law enforcement to utilize informants. Other avenues for reform have been suggested, including suggestions from practitioners and law enforcement agency guidelines for handling informants. However, as will be discussed in Sections IV and V, none reach the heart of the problem, the informant-handler relationship.

A. Scholarly Criticism of the Assumption of Risk Doctrine

Professor Geoffrey R. Stone argues against the court's assumption of risk approach on several grounds.[294] First, he asserts that the use of informants was not a known information-gathering technique at the time the Framers drafted the Constitution.[295] Second, he argues that the basic premise of the approach cuts into the very fabric of interpersonal relationships by assuming that we should question and suspect those whom we naturally trust. For example, betrayal by a friend may be likely, but the friend's collusive relationship with the government is usually unexpected. The assumption of risk argument presumes that people are by nature inclined to be cautious, and that a person can actually detect the betrayal beforehand. In the end, Stone rightly asserts that the assumption of risk argument is a superficial shield to deflect attention from underlying issues, in particular the informant-state relationship and accountability and responsibility for in-

293. *See supra* text accompanying notes 21-26.
294. Stone, *supra* note 20, at 1235-39.
295. Stone, *supra* note 20, at 1239-45.

formant mishandling and misconduct.[296] By focusing only on constitutional rights, however, the rights-based approaches leave intact the informant-handler relationship—the source of the problem.

Rights-based approaches focus on maintaining and expanding constitutionally protected rights to address informant misconduct and mishandling. For example, the rights-based approaches focus on the rights to privacy, due process, counsel, and to be free from unreasonable search and seizure. Specifically, there are two privacy rights-based approaches. One is a public interest analysis that incorporates the nature and impact of government conduct. The other is a multi-factor test that incorporates the public interest analysis and the framers' intent. Both suggestions, however, are underinclusive.

The public interest analysis explores and analyzes the nature of the government's conduct, the degree to which surveillance intrudes into places of solitude, the expectation of privacy, and the impact of the intrusion on the individual and society. The nature of the government conduct is defined in narrow terms with respect to particular illegal conduct.[297] Unfortunately, this mimics the approaches used by the courts, distinguishing between handler and informant, rather than analyzing the entire relationship as well as the resulting mishandling and misconduct. As discussed above, the expectations of privacy approach and the balancing of "public" concerns approach defer to the handler's concerns and lacks insight into the conditions examined.[298]

A rights-based approach that focuses purely on the Sixth Amendment right to counsel is also flawed because the trade-off between expansion of protection and law enforcement is even more direct.[299] The early attachment of the right to counsel[300] assists the criminal defendant, but does not directly address informant or handler conduct.

296. Stone, *supra* note 20, at 1241 (the assumption of risk doctrine assumes "wholly unrealistic ability on the part of the ordinary citizen to detect deception"); *id.* at 1240 ("[T]he Court's repeated invocation of the assumption of risk rationale in the secret agent context is nothing less than an evasion of its responsibility to confront the problem forthrightly."). *See also* Donovan, *supra* note 20, at 367-379.

297. Donovan, *supra* note 20, at 355 (joined to hold a position of power, to cause discord, to steal membership lists or, generally, to monitor and disrupt). Donovan actually defines the nature of the problem in a limiting manner: "(1) aggressive introduction of the paid informer into the life of a citizen; (2) by means of deceit; coupled with (3) the seizing of the contents of communications." *Id.* at 354.

298. *See supra* notes 134-231 and accompanying text (criminal cases) and notes 232-292 (civil cases).

299. *See supra* notes 138-190 and accompanying text. Lurie, *supra* note 20, at 799, 802 (noting the trade off, then suggesting the weakening of the Sixth Amendment in the interest of investigations).

300. Tomkovicz, *supra* note 20, at 66-71.

Likewise, expanding post-conviction remedies has only a limited effect because post-conviction review is quite narrow.[301]

The due process approach takes a broader perspective on the issue of informants and considers the problems with informants and the character of the prison environment. This approach, however, historically was unable to address police interrogation and is currently unworkable with respect to the placement of informants in jail.[302] Professor Welsh S. White offers three suggestions for improving the due process approach.[303] The first is a limit on the use of confessions.[304] The second limits the state's ability to use prison informants, but does not address the problem of perjury.[305] The third excludes unreliable informant testimony.[306]

Even his best choice, the exclusion of unreliable informant testimony, leaves critical factors undefined, and to be resolved by the courts.[307] In determining the definitions of "unreliable" evidence and "exorbitant" rewards, courts presumably will defer to the government

301. Winograde, *supra* note 20, at 774-85 (proposing the granting of judicial use immunity to informants during post-conviction review). Simply, this suggestion presumes that post-hoc attention is the only or best remedy.

302. White, *supra* note 20, at 106-07 (noting that *Miranda* and the Fifth Amendment quickly took over); *see* Perkins v. Illinois, 496 U.S. 292 (1991); Arizona v. Fulminante, 499 U.S. 279 (1991). Justice White's approach in *Fulminante* would require "credible threats of physical violence." *Id.* at 287. Chief Justice Rehnquist, in dissent, would require the showing of an overborne will. *Id.* at 303 (Rehnquist, J., dissenting). White, *supra* note 21, at 605; White, *supra* note 20, at 118 & n.105.

303. White, *supra* note 20, at 119-28, 133-40. The due process approach aims to reform informers through their handlers. In particular, the emphasis on disallowing individuals to be targeted and the elimination of dangerous financial incentives is a step in the right direction. However, concerns persist. These include crediting informants because they are on the government's side, the persistence of and inability to detect perjury, and returning to the rewards system of England. *Id.* at 129-31.

304. *Id.* at 119-28.

305. *Id.*

306. *Id.*

307. This standard, relying on Supreme Court authority on suggestive identifications, would preclude the use of highly unreliable prison informant testimony where the government has contributed to this through rewards. *Id.* at 136-37.

> [W]henever the government offers exorbitant rewards for prison informer testimony, the risk of generating unreliable evidence far outweighs the benefits of the additional reliable testimony likely to be produced.

Id. at 139. Thus, Professor White suggests that non-exorbitant rewards, in light of a typical prisoner's means, would be permissible. For example, instead of release and/or a large sum of money, the state could offer modest sums or a salary. *Id. See also* Lundstrom, *supra* note 20, at 769 (placing limits on the rewards system — "more secretive, less tangible.").

Further, requiring evidence of corroboration, good character of the informant and of the unattractiveness of the reward would bolster the soundness of the arrangement. White, *supra* note 20, at 140.

when dealing with informants.[308] Thus, the unreliability of the informant remains. In addition, the informant rewards remain, as well as any informant expectation of a greater reward.[309]

The other, non-rights-based approaches are even less helpful in addressing the informant-handler relationship. The prior judicial review approach, based on the Fourth Amendment, adapts the warrant requirement to informant use. Thus, a law enforcement official would need judicial approval prior to the use of an informant. The arguments in support of the prior judicial review approach focus too narrowly on distinct cases and neglect the general problems associated with informant handling. For instance, coercion, an element of almost every informant-handler relationship, is not treated as a general concern, but as an issue specific only to one informant. Further, when analyzed in the individual case context, courts have consistently rejected this argument.[310]

Cross-examination is yet another limit to informant abuse. Although greater latitude on cross-examination permits the criminal defendant to explore the shadiness of the informant and low levels of government involvement, it cannot substitute for shifting more of the burden of informant taint to the government or eliminating informants from the process.[311] The success of cross-examination depends on full disclosure of an informant's past, something not always known even to the prosecution.[312] This approach also places great reliance upon and gives deference to law enforcement in its selection and choices with respect to informants.[313]

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308. Police and wardens can easily see that these terms are vague, and defer to the court when they obtain the services of informants. There is no objective standard for reliability to apply or to evaluate conduct against.

309. *See* White, *supra* note 20, at 136 (discussing the core unreliability of jailhouse informers). An unfulfilled expectation may be more dangerous than one met given the extensive documentation of perjury from inmates.

310. *Compare* Note, *Judicial Control*, *supra* note 20, at 1002-06 *with infra* notes 399-400. *Compare* Note, *Judicial Control*, *supra* note 20, at 1014-16, *with* United States v. York, 830 F.2d 885, 890 (9th Cir. 1987); *Compare* Perschetz, *supra* note 23, at 195-202 *with id.* at 202-06.

311. Haglund, *supra* note 20, at 1425-33 (generally assuming that the system can control informants). Further, Haglund specifically states that excluding the use of informants would undermine law enforcement. *Id.* at 1423.

312. If anything, this will raise more *Brady* claims once previously withheld or unknown informant activity comes to light.

313. Haglund, *supra* note 20, at 1433-41. Viewing this, or any other alternative, as the lesser of two evils is self-indulgent. *Id.* at 1417-22 (comparing to contingent fee arrangements with informants and entrapment). This necessarily disregards *Fulminante*, decided afterwards, in which the informant's contingent fee arrangement did not appear to concern the court. White, *supra* note 20, at 125 & n.139. Haglund, after noting the necessity of

B. Systems of Review and the Ineffectiveness of Guidelines

In the wake of informant abuse, investigations have attempted to spur change. The U.S. Attorney General issued the first federal guidelines on the use of informants in 1976 after revelation of the government's counter intelligence program, COINTELPRO.[314] In 1980 these guidelines were superseded, primarily as a result of the revelations associated with ABSCAM.[315] At that same time, a select committee of Congress made numerous proposals for change, including statutory guidelines on activities and reporting, threshold requirements for undercover agents, indemnification of citizen victims, and a general reporting system.[316] However, the committee specifically refused to make a failure to follow guidelines judicially enforceable by

informants to law enforcement, relegates the debate over informants to academia. Haglund, *supra* note 20, at 1423-4.

314. OFFICE OF THE ATTORNEY GENERAL, USE OF INFORMANTS IN DOMESTIC SECURITY, ORGANIZED CRIME, AND OTHER CRIMINAL INVESTIGATIONS, *reprinted in* ABSCAM REPORT, *supra* note 12, app. D at 531-35 [hereinafter INFORMANTS IN DOMESTIC SECURITY]. These guidelines include the rote instructions that informants "shall not: 1. participate in acts of violence; or 2. use unlawful techniques . . . ; or 3. initiate a plan to commit criminal acts; or 4. participate in criminal activities of persons under investigation [unless the FBI determines that is necessary]." *Id.* at 533. The FBI did have some policy as early as 1965, but the contours are unclear. Liuzzo v. United States, 508 F. Supp. 923, 932 nn.5-6 (E.D. Mich. 1981).

315. OFFICE OF THE ATTORNEY GENERAL, ATTORNEY GENERAL'S GUIDELINES ON FBI USE OF INFORMANTS AND CONFIDENTIAL SOURCES, *reprinted in* ABSCAM REPORT, *supra* note 12, app. D at 517-30 [hereinafter FBI INFORMANT GUIDELINES].

316. ABSCAM REPORT, *supra* note 12, at 25-31. The legislation included broad statutory grants of power to perform undercover operations, *id.* at 347-51, exemption from certain laws, *id.* at 352-61, new entrapment legislation, *id.* at 362-77, legislative identification of circumstances warranting undercover operations, *id.* at 377-89, and indemnification of the citizen victim of an operation, *id.* at 389-96. This latter legislation read:

> 1. the injury was proximately caused by conduct, of a federal employee or of any other person acting at the direction of or with the prior acquiescence of federal law enforcement authorities, that violated a federal or state criminal statute during the course of and in furtherance of a Department of Justice undercover operation;
>
> 2. the injury was proximately caused by conduct, of any federal employee or of any informant or other cooperating private individual, that violated a federal or state criminal statute and that the person who engaged in such conduct was enabled to commit by his participation in an undercover operation; or
>
> 3. the injury was proximately caused by negligence on the part of federal employees in the supervision or exercise of control over the undercover operation; provided, however, that an action should not lie under this legislation for injury caused by operational or management decisions that relate to the conduct of the undercover operation.

Id. at 390.

giving courts more power to void a conviction when violations occur.[317] Periodically, other agencies issue similar guidelines.[318]

All of these guidelines state that laws should not be violated and that any criminal conduct should be reported to local law enforcement authorities.[319] However, the FBI's 1980 guidelines specifically permit criminal activity where the informant's role was extremely valuable.[320] Further, all of these guidelines delegate a great deal of discretion to the individual officer and his supervisor.[321] A General Accounting

317. ABSCAM REPORT, *supra* note 12, at 396-97 (citing cases that state that convictions should not be voided due to technical violations, but acknowledging that such judicial power, including voiding convictions due to a violation of due process, would effectively pressure agents to comply with guidelines).

318. *See, e.g.*, DRUG ENFORCEMENT ADMINISTRATION, DOMESTIC OPERATIONS GUIDELINES, *reprinted in* ABSCAM REPORT, *supra* note 12, app. D at 556-72 [hereinafter DEA GUIDELINES]; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, UNDERCOVER GUIDELINES, *reprinted in* ABSCAM REPORT, *supra* note 12, app. D at 573-601.

319. OFFICE OF THE ATTORNEY GENERAL, ATTORNEY GENERAL'S GUIDELINES ON CRIMINAL INVESTIGATIONS OF INDIVIDUALS AND ORGANIZATIONS, *reprinted in* ABSCAM REPORT, *supra* note 12, app. D at 510; FBI INFORMANT GUIDELINES, *supra* note 315, at 524-26; INFORMANTS IN DOMESTIC SECURITY, *supra* note 314, at 533; OFFICE OF THE ATTORNEY GENERAL, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS, *reprinted in* ABSCAM REPORT, *supra* note 12, app. D at 537, 548-50 [hereinafter AG INFORMANT GUIDELINES]; DEA GUIDELINES, *supra* note 318, at 567-68.

320. The 1980 guidelines acknowledged the existence of licensing in the informant use process.

> Informants who are in a position to have useful knowledge of criminal activities often are themselves involved in a criminal livelihood. It is recognized that in the course of using an informant or confidential source, the FBI may receive limited information concerning a variety of criminal activities by the informant or confidential source, and that in regard to less serious participation in criminal activities unconnected to an FBI assignment, it may be necessary to forego any further investigative or enforcement action in order to retain the source of information. However, whenever a Special Agent learns of the commission of a *serious crime* by an informant or confidential source, he shall notify a field office supervisor. The supervisor shall make a determination whether to notify appropriate state or local enforcement or prosecutive authorities of any violation of law and shall make a determination whether continued use of the informant or confidential source is justified .... In determining whether to notify appropriate state or local law enforcement or prosecutive authorities of criminal activity by FBI informants and confidential sources, the FBI shall consider:
> (a) whether the crime is completed, imminent or inchoate; (b) the seriousness of the crime in terms of danger to life and property; ... (f) the effect of notification on FBI investigative activity.

FBI INFORMANT GUIDELINES, *supra* note 315, at 525-26. *See supra* note 319. Commenting on the change, which occurred in the midst of the controversy over FBI informant Gary Thomas Rowe's participation in Klan activity and prosecution for murder, FBI Director William Webster stated that Rowe's participation in the murder was acceptable as long as he did not actually kill her. If he shot to kill, then the FBI would turn over the information. Gregory Gordon, *Washington News*, UPI, Dec. 15, 1980, *available in* LEXIS, Nexis Library, UPI File.

321. Reuter, *supra* note 9, at 110. During the course of researching this article I made several requests under the Freedom of Information Act (or the comparable state statute)

to law enforcement agencies where informant handling had been a problem in the past. These agencies included the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco and Firearms, the Federal Bureau of Investigation (FBI), the Department of Justice, the United States Attorney for the Northern District of Illinois, the Chicago, San Diego and New York police departments, the Los Angeles Sheriff's Department and the Illinois State Police. The FBI, DEA, Federal Bureau of Prisons (BOP), New York Police Department (NYPD), and Illinois State Police (ISP) responded with copies of guidelines.

None of the guidelines provided definitive terms or conditions under which the relationship with the informant should be terminated. The cover memo to the FBI guidelines purported to do so, but the actual guidelines did not contain this information. William H. Webster, *Memorandum To All Special Agents, Re: Attorney General's Guidelines on FBI Use Of Informants And Confidential Sources*, Jan. 5, 1981, at 3 [hereinafter *Memorandum*].

In addition to Webster's *Memorandum*, the FBI provided § 137 of its Manual of Investigative Operations, which addresses informants. FEDERAL BUREAU OF INVESTIGATION, MANUAL OF INVESTIGATIVE OPERATIONS, § 137 (1987) [hereinafter MIOG]. The dates in § 137 range from 1/12/81 to 5/11/87. Certain sections require reassessment of informants at least every sixty days and suggest that supervisors meet with informants to assess the handling. *Id.* at § 137-2. The regulations also require an evaluative period, which can last from 1 to 120 days, of the informant's suitability and pertinence. During this time, voluntary information is accepted, but the informant "may not be used to participate in criminal activities or provide substantial operational assistance in an undercover proceeding." *Id.* at § 137-3.1(3). To determine suitability, agents must consider whether the informant is able and willing to provide information, whether the informant is directed by others to obtain information from the FBI, and whether the informant's background renders the informant "unfit." Further, the agent should consider the informant's background (such as whether he or she was engaged in serious criminal activity) with the importance of the investigation, the informant's motive, alternative sources of the information, the informant's reliability, the informant's record of conformity with instructions, the risk of infringing on privileged conversations, and the risk that the informant will compromise the investigation. *Id.* at § 137-3.1.1.

The regulations specifically restrict the use of members of the news media, attorneys, doctors and clergy as informants due to their respective legal privileges. *Id.* at § 137-3.3. Agents are also instructed to admonish informants that: (1) their assistance is voluntary and will not exempt them from prosecution for illegal activity "except where such violations were approved by a field office supervisor;" (2) they are not employees or agents; (3) their relationship must be kept confidential; (4) they must report positive information as soon as possible; (5) the FBI has limited jurisdiction; (6) they shall not participate in acts of violence and should try to discourage violence; (7) they shall not use unlawful techniques; (8) they shall not initiate a plan to commit criminal acts; (9) they shall not participate in criminal activities unless approved; (10) the payments they receive are income; and (11) their informant status will not protect them from prosecution for illegal acts unless approved. *Id.* at § 137-3.4.

The guidelines with regulating informant participation in criminal activity appear to be less constraining than those previously promulgated. For example, while criminal activity previously had to be for "paramount prosecutive purposes," FBI INFORMANT GUIDELINES, *supra* note 315, at 522; AG INFORMANT GUIDELINES, *supra* note 319, at 549, now it need only be for "prosecutive purposes." MIOG, *supra*, at § 137-4(1)(a). Further, prior guidelines required approval for "ordinary" crimes, while current guidelines exempt such "routine purchase of stolen or contraband goods." *Id.* at § 137-4(1). Other criminal activity is defined as "extraordinary." *Id.* at § 137-4(3).

Subsequent sections, although significantly redacted, address maintaining control without exercising undue influence, reassessment upon receipt of false information, and

Office (GAO) review of an FBI internal audit of the effectiveness of these guidelines criticized the lack of informant control. The GAO review revealed FBI reviewer bias, ineffective constraints, and unsuccessful control of informants.[322] In addition, the Justice Department

keeping records, *id.* at § 137-5, informant files, *id.* at § 137-9, and informant payments. *Id.* at § 137-10.

The DEA document provided (labeled "6612.33 Informant Statements") was heavily edited and revealed only that agents must take statements from informants. The BOP provided an excerpt from Program Statement 5270.07, entitled, "Discipline and Special Housing Units." The document discussed the necessity of maintaining the confidentiality of informants and the unreliability of informants. However, the document further stated that in an unwitnessed assault, "the statement of a seriously injured victim *could* be sufficient evidence to support a finding without corroborating evidence." (emphasis original).

The NYPD documents defined of informant and required (1) notice to superiors of every informant, (2) interviews with informant prior to use, (3) documentation of the interview to be reviewed by superiors, (4) registration of informants prior to use, (5) maintaining a file on each informant whether active or not, and (6) bi-yearly evaluation of each informant. NEW YORK POLICE DEPARTMENT, PATROL GUIDE, PROCEDURE NO. 116-44, Confidential Informants (Revision Nos. 84-7 & 87-4).

The ISP documents provide information similar to the NYPD guidelines. However, the ISP directive also includes (1) investigation of the informant's background, photographing and fingerprinting, and (2) restrictions on informant relations (no "gifts, loans or any form of gratuities") and contact (need additional sworn personnel to corroborate). ILLINOIS STATE POLICE, DEPARTMENT DIRECTIVE NO. 91-100, Confidential Sources. Further, the guidelines address in some detail informant handling. *Id.* These include: not divulging information or ISP activities, recommending two sworn personnel at meetings but requiring two with informants of the opposite sex, limiting informant payments to authorized amounts and requiring supporting documentation (with signatures and receipts), searches of informants when operation involves controlled substances, and prohibiting "explicit or implicit promises or predictions regarding the likely disposition of any criminal charges that are pending." *Id.* On using parolees, releasees or prisoners, the guidelines require requesting authorization from the Department of Corrections and the state's attorney. *Id.*

322. *See, e.g.,* GENERAL ACCOUNTING OFFICE, REP. NO. GGD-80-37, FBI AUDIT CONCLUSIONS ON THE CRIMINAL INFORMANT PROGRAM SHOULD HAVE BEEN QUALIFIED (1980) [hereinafter GAO FBI AUDIT] (study based on agent responses because FBI refused access to individual informant files). The FBI's review is unpublished. MARX, *supra* note 14, at 187 n.12. *See also* GRAND JURY REPORT, *supra* note 15, at 51, 76, 104 n.39 (Los Angeles Police Department guidelines on determining undesirable informants do not consider past provision of false information); David Marc Kleinman, *Out of the Shadows and Into the Files: Who Should Control Informants?*, POLICE MAG., Nov. 1980, at 36, 40 (noting that the N.Y.P.D. guidelines and registration requirements are largely ignored by the officers).

The FBI's internal review found only one instance where an agent failed to report an informant's criminal conduct. Reuter, *supra* note 9, at 111. The review also found that twenty-three agents operated without adequate understanding of the guidelines, but no indication was given as to what percentage this represented. MARX, *supra* note 14, at 187 n.12. In auditing this internal review, the GAO noted that the FBI conducted no interviews with agents or informants—agents only had to answer non-confidential questionnaires. GAO FBI AUDIT, *supra*, at 6 (FBI did not believe confidential questionnaires would have increased reliability); Moore, *supra* note 3, at 111.

acknowledged that no review can detect all transgressions.[323] Further, the psychological risk to the prospective informant, the ethical soundness of the venture, the duration of the operation, the handling of the informant, and the level of risk to citizens' property, privacy, and civil rights have not been primary, or at times even important, law enforcement considerations.[324]

A wide variety of other suggestions to redress informant mishandling have arisen. Most legislative enactments affect warrants, the disclosure of the informant's identity, funds paid to informants, the examination of informants at trial, or the criminality of interfering with someone trying to inform.[325] Following informant scandals, suggested reforms have included state bar association review of prosecutorial misconduct, new local or national guidelines for law enforcement handlers, and jury instructions on informants.[326]

Further, the FBI did not evaluate compliance with the requirement of weighing the value of the informant against the value the suspect seeks from the government. GAO FBI AUDIT, *supra*, at 9.

323. In addressing the shortage in reporting informant numbers, the Justice Department noted "that no reasonable audit procedures will insure the detection of improprieties, especially if collusion is involved." GAO FBI AUDIT, *supra* note 322, at 23.

324. DeStefano, *supra* note 38, § 2 at 2 (psychological risk); Basler, *supra* note 38, at B3. In a particularly telling case, FBI agent Daniel Mitrione went undercover and met up with career informant Hilmer Sandini to penetrate drug organizations. DeStefano, *supra* note 38, § 2 at 2; Lehr, *supra* note 83, at A28. After years of working with Sandini and little contact, support or direction from superiors, Mitrione became involved with and profited from the criminal activity. *Id.*

325. On warrants, *see, e.g.*, CONN. GEN. STAT. ANN. § 54-41c (West 1985) (application for warrant includes informant identity and the basis for reliability); IOWA CODE ANN. § 813 (West Supp. 1993) (includes checklist for: number of years known, whether informant is mature, regularly employed, a student in good standing, a well-respected family or business person, has truthful reputation, no motive to falsify information, no known association with known criminals, and no known criminal record, as well as information on the informant's reliability in the past (i.e. truth, arrests made based upon info)). On disclosure of informant identity, *see, e.g.*, CAL. EVID. CODE § 1042 (West 1966) (not required to reveal identity of informant unless he or she is a material witness and then, only after a hearing); OKLA. STAT. ANN. tit. 12, § 2510 (West 1993) (same).

On disclosure of funds paid to informants, *see, e.g.*, S.C. CODE ANN. § 1-1-1000 (Law. Co-op. 1986) (no disclosure of expenses to jeopardize law enforcement confidentiality, but required reporting of total funds paid to informants). On examination of informants at trial, *see, e.g.*, 19 U.S.C. § 537 (1988) (allowing examination for specific offenses without giving up share or interest in penalty); 28 U.S.C. § 1822 (1988) (allowing examination of anyone with an interest in a share of a fine). On criminal interference with informants, *see, e.g.*, 18 U.S.C. § 873 (1988) (criminalizes threat to inform or payment of money for not informing); N.D. CENT. CODE § 12.1-09-02 (1985) (use of deceit or threat, force or bribe to stop information relating to offense).

326. In the *McMartin* preschool child abuse case in California, where the prosecution relied in part on jailhouse informant confessions from a defendant, the criminal defense

Inevitably, to reform the use of informants, one must incorporate both the theory underlying informant use and the history behind their improper methods. Adding the contextual analysis applied by the courts to the examination of each reveals the need for a proposal that truly redefines the relationship between the informant and the handler.

V. Law Enforcement Handling and Control of Informants

Both conventionalists[327] and realists among law enforcement practitioners agree on a number of basic issues, such as the importance of identifying informant motives and implementing direct and indirect control over the informant.[328] Their approaches, however, differ regarding accountability and responsibility for handling informants. The judicial use of assumption of risk and distancing handlers from their informants signifies the adoption of the conventionalists' approach to law enforcement. The realists' approach, however, reflects a more palatable balancing of law enforcement and society's interests. A true understanding of the realist approach requires exploration into both schools of thought.

A. Informant Motivations and Control

Both conventionalists and realists agree that law enforcement officials are severely disadvantaged in handling or controlling an informant absent a clear, accurate, and complete understanding of the

counsel filed charges against the prosecution with the California State Bar Association after the defendants were acquired. Rainey, *supra* note 73, at B3.

On new guidelines, *see generally* ABSCAM REPORT, *supra* note 12, at app. D (detailing the reform guidelines of the Attorney General, the FBI, the DEA, and the Immigration and Naturalization Service); GRAND JURY REPORT, *supra* note 15, at 149-51 (recommending new guidelines in the district attorney and sheriff's office); *infra* notes 350-355 and accompanying text (on conventional model). All of these efforts, if not acknowledging the root problems, are destined to fail. *See infra* notes 356-371 and accompanying text (on weaknesses).

After the jailhouse informant scandal, California adopted a new jury instruction on the use of informant testimony. Rohrlich, *Informant Owns Up*, *supra* note 16, at A1, A24. Federal pattern instructions all identify that an informant's testimony and credibility should be treated with "caution," "great care" or "carefully." PATTERN JURY INSTRUCTION OF THE DISTRICT JUDGES ASSOCIATION OF THE ELEVENTH CIRCUIT, CRIMINAL CASES, SPECIAL INSTRUCTION 1.1 ACCOMPLICE-INFORMER IMMUNITY (1985); 1 DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS CIVIL AND CRIMINAL § 15.02 CREDIBILITY OF WITNESSES-INFORMANT (1987).

327. *See supra* notes 98-133, 134-231, and 232-292 and accompanying text.

328. Certainly a multitude of other issues exist, including the recruitment of informants and maintaining informant confidentiality. *See generally* MORRIS, *supra* note 4; HARNEY & CROSS, *supra* note 4.

informant's motivation for cooperating.[329] Motivations can include particular tangible rewards, some emotional impetuses, or both. Common tangible rewards include favorable treatment in avoiding arrest, sentencing, or incarceration.[330] Common emotional impetuses include the thrill of playing detective, fear, and survival.[331] Some informants, particularly those who work for money or out of greed, have multiple motives, all of which should be known to the handler.[332] The motivation allows the handler to determine the informant's expectations and to predict the informant's conduct.[333]

The informant-handler relationship must be thoroughly controlled by the latter. If the reverse occurs, then the relationship should be terminated, even at the cost of undermining the investiga-

329. MORRIS, *supra* note 4, § II at 1 ("It is the common feeling throughout the justice community that informant motives *must* be known whenever possible prior to the receipt of informant information. Carmine Motto wrote: 'Without knowing his motive, it would be nearly impossible to work with him, as his expectations may be far greater than the agency could afford.'" (emphasis original)); LYMAN, *supra* note 5, at 132 ("an informer's motives could weigh heavily against the officer's safety or the credibility of the investigation"); MARX, *supra* note 14, at 152.

330. On avoidance of arrest, *see* MORRIS, *supra* note 4, § II at 1; WILSON, *supra* note 4, at 65. On special sentencing considerations, *see* MORRIS, *supra* note 4, § II at 1; Ben Jacobsen, *Informants and the Public Police, in* CRIMINAL AND CIVIL INVESTIGATION HANDBOOK 4-63, 4-69 (Joseph J. Grau ed., 1981); WILSON, *supra* note 4, at 65. On reduced incarceration, *see* MORRIS, *supra* note 4, § II at 1; Farris, *supra* note 4, at 30; WILSON, *supra* note 4, at 65.

331. On playing detective, *see* MORRIS, supra note 4, § II at 2; HARNEY & CROSS, *supra* note 4, at 47, 57-59. On fear and survival, *see* MORRIS, *supra* note 4, § II at 3; HARNEY & CROSS, *supra* note 4, at 41-42; LYMAN, *supra* note 5, at 134 (including retribution from associates). Some informants desire information for power over criminal competition. MORRIS, *supra* note 4, § II at 2; HARNEY & CROSS, *supra* note 4, at 43-44 (elimination of competition, to find out what the police know, lead the police away from informer's crimes and to extort other criminals); Farris, *supra* note 4, at 30.

Some informants are motivated by other emotions, such as ego, revenge and jealousy. MORRIS, *supra* note 4 § II at 3-4 (this includes vanity, ego, superiority, jealousy and revenge); HARNEY & CROSS, *supra* note 4, at 42-44 (egotistical, self-importance), 47 (revulsion at particular crimes), 47-48 (repentance), 49 (gratitude); LYMAN, *supra* note 5, at 134 (revenge, jealousy), 135 (ego and repentance); Jacobsen, *supra* note 330, at 4-70 (revenge, jealousy); Farris, *supra* note 4, at 30 (revenge, civic mindedness and vanity).

Other informants are classified as nuisances. MORRIS, *supra* note 4, § II at 6 (this is the person who bothers the police rather than being helpful or recruited); HARNEY & CROSS, *supra* note 4, at 48 (demented or eccentric). Finally, some people tender information to the police inadvertently. MORRIS, *supra* note 4, §II at 7; LYMAN, *supra* note 5, at 135 (unwitting).

332. LYMAN, *supra* note 5, at 132-33, 135. On monetary rewards, *see* MORRIS, *supra* note 4, § II at 4-6; HARNEY & CROSS, *supra* note 4, at 45-47 (extremely valuable device); Jacobsen, *supra* note 330, at 4-70; Farris, *supra* note 4, at 30; WILSON, *supra* note 4, at 67.

333. MORRIS, *supra* note 4, §II at 2.

tion.[334] In order to maintain a favorable balance, the handler should keep detailed records on the informant, specifically instruct the informant, obtain corroborative evidence, and avoid criminal activity by the informant. Further, the law enforcement agency should establish and maintain a managerial supervisor for officers working with informants.[335]

The necessary documentation includes obtaining background information, keeping notes of meetings and evidence received, and recording all benefits provided. Initially, the handler should obtain detailed background information about the informant so that credibility and motives can be documented and evaluated. Detailed reports should also be kept of all subsequent meetings, information and payments, including receipts for all benefits.[336] To maintain control, the handler should exclude the informant from strategy and decision-making.[337] At each significant stage, the informant should sign an agreement. The agreement with the police should specifically identify the terms offered, the method and amount of compensation or benefit, and the information sought.[338] The agreement with the prosecution should identify both prior arrests and the pending charges against

334. *Id.* § III at 8 ("If the control officer cannot dominate the contributor in every action the two make together, it is surely better that the contributor be immediately discarded regardless of the consequences to the case."); HARNEY & CROSS, *supra* note 4, at 69 (noting the need to maintain perspective, not cut deals and never offer portions of proceeds); LYMAN, *supra* note 5, at 140 ("must always remain in control"); James R. Farris, *A Model for Police Intelligence Units, in* CRITICAL ISSUES IN CRIMINAL INVESTIGATION 79, 92 (Michael J. Palmiotto ed., 2d Ed. 1988) (control is "too important to be handled in an informal, and possibly haphazard fashion.").

335. Interestingly, Farris reported in 1984 that two models were currently in use to manage informants. Farris, *supra* note 4, at 33-39. The first model involved delegation of discretion to officers with respect to selection and control of informants because "informant programs tend to be highly individualistic, fragmented, and competitive." *Id.* at 33. In this approach, there is generally "no overall planning, evaluation and cost-effective analysis governing the expenditure of funds to informants." *Id.* at 34. This approach was used by both the FBI and the DEA. WILSON, *supra* note 4, at 76.

The second model increased management control and propagated guidelines to follow. Farris, *supra* note 4, at 35-39. Basic control still rested with the officer, but the control is monitored. Not surprisingly, when Farris wrote about informants in 1988, the first model was not mentioned. Farris, *supra* note 334. Yet, the jailhouse informant scandal in Los Angeles, *see supra* notes 15-61 and accompanying text, indicates that the first model was still in use by large law enforcement agencies.

336. MORRIS, *supra* note 4, § II, §§ III-10 to -11, §§ IV-16 to -17, -20 to -21; HARNEY & CROSS, *supra* note 4, at 62; LYMAN, *supra* note 5, at 133, 136 (documenting motives through extensive interviews), 140; Jacobsen, *supra* note 330, § 4-71; Farris, *supra* note 334, at 92-93 (recommending evaluation should be performed by management), 96; Farris, *supra* note 4, at 36.

337. *See* MORRIS, *supra* note 4; §§ III-8 to -9.

338. LYMAN, *supra* note 5, at 137-39.

the informant, as well as the content of all promises and the method and amount of payments or benefits.[339]

With respect to instructions, the handler should always maintain control over both incoming and outgoing information. Information should always flow from the informant to the handler and never from the handler to the informant, except when giving the informant specific instructions on what information is desired.[340]

The information from the informant should be corroborated so that the handler can substitute other evidence and avoid the need for the informant's testimony. The handler should obtain corroboration of all informant information provided.[341] The handler should also try to obtain and present probable cause for a warrant without using the informant, unless absolutely necessary.[342] The handler's ultimate goal is to reduce the chances that the informant will have to testify.[343] Further, the handler should instruct the informant not to participate in criminal activity and should not actually allow participation in criminal activity. If the informant either commits a crime or is wanted elsewhere for a crime, the relationship should be terminated.[344]

Finally, some superstructure of alternative control-handlers and management-level support should exist to oversee informant use.[345] Management should maintain a department-wide directory of informants to avoid informants who may use more than one handler (resulting in self-corroboration).[346] Such a directory will maximize information and allow a handler to cross-check an informant's effectiveness, reliability, and veracity, and will reveal activity including testimony, use for warrants and court-ordered eavesdropping.[347] The manager overseeing the superstructure will need informant-handling expertise and will serve as a clearinghouse for all informant dealings, information, and control. The manager should draft guidelines on the

339. *See* MORRIS, *supra* note 4, §§ IV-21 to -22.

340. *Id.* § III-9 (recommending never give new information, never trade information), §§ III-10 to -11; Farris, *supra* note 4, at 36.

341. This can either be physical evidence or another source. *See* MORRIS, *supra* note 4, § III-9; HARNEY & CROSS, *supra* note 4, at 79; LYMAN, *supra* note 5, at 144-45.

342. HARNEY & CROSS, *supra* note 4, at 73 (seen as a means of "protecting the informer").

343. LYMAN, *supra* note 5, at 144-45.

344. MORRIS, *supra* note 4, at III-19 (recommending against use of "wanted" informants), § III-9; LYMAN, *supra* note 5, at 137; Farris, *supra* note 334, at 96; Farris, *supra* note 4, at 36.

345. Morris, *supra* note 4, III-10 to -11 (discussing alternate control of officers); Farris, *supra* note 334, at 92-96; Farris, *supra* note 4, at 35-39.

346. Farris, *supra* note 334, at 92-93; Farris, *supra* note 4, at 37.

347. Farris, *supra* note 334, at 92-93; Farris, *supra* note 4, at 37.

use of informants, including the use of funds for compensation.[348] In addition, the department should maintain a "blacklist" of bad informants.[349]

B. The Conventionalist Approach

The conventionalist's approach views every arrestee as a potential informant, sees every bit of information as potentially helpful, and considers abuses of the rewards system to be merely a historical footnote.[350] This deferential, pro-law enforcement approach displays, at times, utter disdain for constitutional constraints.[351]

On informant motivation, the conventionalists believe that informants motivated by fear, survival, or avoidance of punishment are the most reliable because "they have little to lose and much to gain."[352] They concede, however, that informants motivated by revenge, revulsion of crime, mercenary desires, and ego are not easily controlled.[353]

The conventionalists adhere so vigorously to the use of informants that they argue for the utmost levels of informant confidentiality, statutory protection, and physical protection by the police.[354] Further, the conventionalists assume that instructing the informant not to commit crimes and the handler's lack of direct knowledge of crimes mean that crimes do not occur or are not the responsibility of the handler.[355] The assumptions and applications of the conventionalists' approach are what the courts have adopted in the assumption of risk and distancing doctrines. This unitary approach, however, is neither sound nor reasonable.

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348. *See* Farris, *supra* note 334, at 92-93, 97; Farris, *supra* note 4, at 37.

349. MORRIS, *supra* note 4, § IV-26 to -27.

350. HARNEY & CROSS, *supra* note 4, at 80, 82, 85 (noting that the abuses of the rewards system ended in England in the sixteenth century). *But see infra* notes 457-467 and accompanying text (discussing continuation into the seventeenth century).

351. *See, e.g.*, HARNEY & CROSS, *supra* note 4, at 17 (stating the privilege against self-incrimination, described as the right to withhold information, "dealt American law enforcement savage and disabling blows.")

352. MORRIS, *supra* note 4, § II-3. *See also* LYMAN, *supra* note 5, at 134; Jacobsen, *supra* note 330, § 4-71 (noting that informers are more productive as sentencing nears).

353. LYMAN, *supra* note 5, at 134-35; Jacobsen, *supra* note 330, at 4-70 (discussing informants motivated by revenge and greed).

354. HARNEY & CROSS, *supra* note 4, at 71 (keeping all informers confidential), 73 (keeping them off warrants to protect), 74 (calling for stronger laws to protect informants); Jacobsen, *supra* note 330, 4-78 to 4-79; Farris, *supra* note 334, at 97. Even the realists acknowledge that some level of protection is needed because of violent acts against informants. *See also* MARX, *supra* note 14, at 146-47 (noting changes faced by informants).

355. *See, e.g.*, LYMAN, *supra* note 5, at 137-38, 146 (noting officers must be able to observe drug buys in order to avoid drug or money skimming by informants).

C. The Realist Approach

Like the conventionalists, the realists accept the need and use of informants.[356] However, two key differences exist in the realists' approach to informants. One is that they consider handler training inadequate and ineffective because handlers and informants are delegated too much discretion in the process. Second, the realists recognize that informant motivations are not the only driving force for cooperation, but may include manipulation of the system for personal gain. Realists doubt that informants can truly be handled effectively and view their use as a grant to informants to act as they see fit, a further delegation of discretion.[357]

Realists view informants as "weak links" that should be replaced by law enforcement personnel as quickly as possible.[358] The realists' skepticism is based on the problems associated with informants. Such problems are inherent, starting with their motivations, which almost always conflict with the goals of law enforcement.[359] According to the realists, informants, although instructed not to commit crimes, will generally ignore the standards, use prohibited methods, lie, believe that the handler has granted them immunity, and feel as if they have "grown a badge."[360] Further, the realists believe that the handler will ignore informant disregard of the rules, which is viewed as a cost of doing business.[361] Another problem perceived by the realists is that

356. Reuter, *supra* note 9, at 107-09.

357. *Id.* at 103-07 ("It is no mystery why the police become issuers of criminal licenses."); SKOLNICK, *supra* note 3, at 128 (describing police perception of informant "criminal tendencies as inevitable"); BLUM, *supra* note 77, at 188 (describing rampant licensing).

358. MARX, *supra* note 14, at 158.

359. *See id.* at 152; *cf.* BLUM, *supra* note 77, at 168-69 (noting informant motives change over time).

360. Marx, *supra* note 35, at 152-53.

361. *Id.* at 155; Reuter, *supra* note 9, at 102-04 (noting specific circumstances). A wide range of circumstances where the police ignore abuse by informants have been documented. SKOLNICK, *supra* note 3, at 128, 141 (drug use); LEROY C. GOULD ET AL., CONNECTIONS: NOTES FROM THE HEROIN WORLD 72-73 (1974) (drug use); PETER MANNING, THE NARC'S GAME 162 (1980) (drug use); REUTER, *supra* note 4, at 194 (bookmaking); ANTHONY VILANO, BRICK AGENT 96, 112, 116 (1977) (handler thought stealing was less of a problem than crimes involved in information); ROBERT DALEY, PRINCE OF THE CITY 243 (1978) (cop rushes to court each time informant is arrested). Some officers deliberately avoid discussing topics with informants so that they will not learn about crimes. SKOLNICK, *supra* note 3, at 129. In the Los Angeles jailhouse informant scandal, Leslie White, the chief informant, had told prosecutors ten years earlier that he had committed perjury in return for favors. Berke, *supra* note 59, at 11-12. His confession went unnoticed and his perjury continued. *Id.* At this earlier time, White was labelled a "flake." GRAND JURY REPORT, *supra* note 15, at 17.

handlers are very creative in legally corroborating illegally obtained information. These infractions multiply as the informant realizes that more latitude is being provided. Thus, informants know what is needed, know what they can get away with, and know that handlers will cover for them to obtain the information necessary for an arrest.[362]

Realists assert that all of the training and structure imposed to control the informant are undermined by the nature of the situation.[363] By its very nature, an agency's informant policy is more a "broad statement of principle" than a policy to be implemented.[364] Necessarily then, the general policy results in "significant delegation of discretionary power to the individual officer" to make decisions on how to handle and control informants, including the appropriate amount of recompense.[365] The minor regulations, especially paperwork requirements, receive little attention. The handler has no desire and sees little benefit in formalizing the informant relationship.[366] More significantly, in order to obtain the necessary information for arrests (the only true evaluative method in law enforcement), "the police, in effect, transfer police power to citizens who have been given neither a background check into character nor police training in law."[367] As a result, the informant operates with few, if any, limitations. The upper echelons of law enforcement administration are "continually conscious of the unhealthy or even corrupt relationship that may develop between an informant and an investigator" and yet they are unwilling or unable to interpose corrective measures.[368]

According to the realist critique, the ultimate (and at times only) form of control is jail or public disclosure, "a kind of institutionalized

362. MARX, *supra* note 14, at 152-55.

363. *See generally id.* at 154; Reuter, *supra* note 9, at 103 (discretion necessary to officer is problem even with the strictest of guidelines).

364. Brown, *supra* note 5, at 254 (quoting O.W. WILSON, POLICE ADMINISTRATION 129 (1972)).

365. SKOLNICK, *supra* note 3, at 263.

366. Reuter, *supra* note 9, at 112 (citing too much paperwork, the ability to "fiddle with" expense accounts to cover payments, and the prospect that informants who are required to "sign up" will "clam up"); Kleinman, *supra* note 322 at 36, 38 (noting internal FBI review showed that agents fail to document instructing informants that they "shall not engage in specific activities"), 40 (registering informants causes them to "clam up").

367. SKOLNICK, *supra* note 3, at 101-02, 126 ("nature of his role demands that he ingratiate himself with the illegal actor"); Kleinman, *supra* note 322, at 38 (quoting active FBI agent as saying, "There's a recognition that the informer's going to be more productive if you don't spell all the no-nos out to him, and don't take him to task unless you have to.").

368. Justin J. Dintino & Clinton L. Pagano, *The Investigative Function: Reassessing the Quality of Management*, 51 THE POLICE CHIEF, June 1984, at 55, 56.

blackmail."[369] This coercion is very real and commences at the start of many informant-handler relationships.[370] Therefore, the realists contend that the informant and the handler equally benefit from stretching the rules, so long as the informant believes that no negative consequences will follow and the handler can obtain sufficient cause to search or arrest the target.[371]

The realists endorse three solutions to cure mishandling of informants. First, control problems should be decreased. Second, the informant should be replaced with an agent as soon as possible. Lastly, constitutional concerns regarding the informant-handler relationship should be incorporated into adjudications.[372]

Informant history proves that the realists' views are more accurate than the conventionalists.[373] Two areas of concern, informant reliability and guideline effectiveness, exemplify the validity of the approach and the need for more accountability and responsibility in the informant-handler relationship. Acceptance of the unreliability of informants' information is a necessary precondition to effectively evaluating their use, their conduct, and government responsibility for their actions. As one expert testified before the Los Angeles Grand Jury, "95% of the stuff you get is bogus."[374] To the informant, "truthful" means "consistent with the prosecution's theory of the case. Otherwise, of course, there is no point in calling the informant as a witness."[375] The investigative and fact-finding processes are infected by this perceived purpose of the informant. Further, this results in the

369. Gary T. Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, 28 CRIME & DELINQ. 165, 180 (1982); SKOLNICK, *supra* note 3, at 125 (noting police "can often control the informer only by invoking the law").

370. WILSON, *supra* note 4, at 73 (efforts to flip suspects begin almost immediately); Misner & Clough, *supra* note 20, at 731-34 (discussing both compulsion and indebtedness as factors influencing the informant to be and remain cooperative); Kleinman, *supra* note 322, at 38 (noting practice is not to charge informant "unless you have to").

371. Reuter, *supra* note 9, at 112-13; BLUM, *supra* note 77, at 170 (noting symbiotic working relationship between informant and handler).

372. MARX, *supra* note 14, at 158; Moore, *supra* note 3, at 28 (constitutional concerns include (1) "the extensiveness of [the govt's] effort," (2) "the intensiveness of [govt's] effort," (3) "whether the focus is on persons or on time, place and activity," (4) "the covertness or deceptiveness of the information gathering," (5) "the size and character of inducements offered" to informants, and (6) "the government's role in instigating or facilitating the offense"), 109; Reuter, *supra* note 9 at 112-13 ("necessary to formalize the relationship and the payments" but "little we can do to change the current situation").

373. *See infra* text accompanying notes 413-490 (on history).

374. GRAND JURY REPORT, *supra* note 15, at 75 n.27.

375. *Id.* at 95.

fact-finder's lack of a basis to evaluate the influence of benefits offered or received.[376]

Courts, however, predominantly accept the reliability of an informant with a minimal level of corroboration from the police and prosecutors.[377] Prosecutors willingly accept and proffer informant testimony without a critical eye, in part because they are not constrained to act otherwise.[378] They cannot be relied upon to regulate informants because they have an inherent conflict of interest.[379] Further, they too dislike paperwork requirements and fear discovery of constitutional violations by law enforcement.[380]

Second, the existence and reliance upon inherently ineffective procedures and guidelines to control the selection, supervision, and monitoring of the informants lies at the root of the problems. Experience, both past and recent, shows that guidelines either are not, or cannot, be followed.[381] As a result, informants can and will operate with wide discretion, demand favors disproportionate to the quality of the information provided, and feel licensed to violate the law.

D. The Realist Model, Under Color of Law, and State Action

The realists' approach balances considerations that are otherwise ignored by the courts when addressing informants. The application of the assumption of risk and distancing doctrines removes vital linkages

376. *Id.* at 96. This is particularly so if the trier of fact does not know of any benefit, if the benefit has not yet been determined, or if the trier of fact does not understand the value of what may appear to be a minimal reward. *See also* Donnelly, *supra* note 5, at 1126-27 (asserting that jurors do not question the veracity or credibility of informants).

377. *See supra* notes 98-133 (discussing unquestioning use of informants).

378. *See, e.g.*, GRAND JURY REPORT, *supra* note 15, at 40 (first prosecutor rejects informant, second prosecutor uses), 41 (prosecution rejects informant and informant then approaches defense counsel), 41 (after prosecution refused to help informant with release after preliminary hearing testimony, informant wrote letter saying, "the more he thought about it, the more he believed his conversation with the defendant never took place"), 95-111 (examples of lack of oversight and review), 111-12 (lack of records leaving all information to anecdotes and word of mouth).

379. *See supra* notes 356-381 and accompanying text. After exposure of informant problems in Los Angeles, only the informants were prosecuted while the prosecutors and police were not penalized. GRAND JURY REPORT, *supra* note 15, at 90-92 (no perjury prosecutions before the report and uncovering of the scandal despite clear instances of perjury). In one instance, when an informant had obviously lied on the stand, the prosecutor merely told the jury to disregard the testimony, but took no further action except to arrange for the informant's release and disposition of the charges against him. *Id.* at 91.

380. *See id.* at 112-22 (recommends creation of informant files, but recognizes that this has been rejected for those reasons). *But see* Giglio v. United States, 405 U.S. 150, 154 (1972) (describing prosecutor's duty to disclose despite "burden on the large prosecution offices").

381. See text accompanying notes 314-326 (describing realist approach).

that make handlers accountable for their misuse of informants. On the other hand, the application of a legal doctrine that examines the interplay between governmental and private actors embodies a better balancing of the victim's, society's, and law enforcement's interest. The "state actor" test, as derived from the under color of law and state action doctrine, provides such an avenue. This test incorporates the realists' perspective and requires exploration and consideration of the informant-handler relationship.

Although the concepts "under color of law" and "state action" are present in § 1983 and the Fourteenth Amendment, respectively,[382] the definitions of each have been kneaded together time and time again by the Supreme Court.[383] For example, in *West v. Atkins*,[384] a North Carolina prisoner sued a private doctor who was under contract with the state to provide medical care to prisoners.[385] West claimed that the medical treatment rendered by Atkins violated his Eighth Amendment right to be free from cruel and unusual punishment.[386] West sued pursuant to § 1983.[387] Thus, the Court examined whether Atkins was acting under color of law. The Court's opinion is replete with the alternating use of the terms "color of law" and "state action."[388] At one point, after discussing "color of state law," the Court's footnote only discusses state action.[389]

382. 42 U.S.C. § 1983 (1988); U.S. CONST. amend. XIV.

383. *See, e.g.*, Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 n.18 (1982) (holding § 1983 color of law standard adds nothing to Fourteenth Amendment state action requirement); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Blum v. Yaretsky, 457 U.S. 991, 1009 n.20 (1982); United States v. Price, 383 U.S. 787, 794 n.7 (1966) (noting that § 1983 color of law standard, like that found in 18 U.S.C. § 242, is consistent with Fourteenth Amendment state action standard); United States v. Classic, 313 U.S. 299, 326 (1991). Before *Price*, the Court in *Classic* defined "under color of law" relying on *Ex parte* Virginia, 100 U.S. 339, 346 (1880), a Fourteenth Amendment case examining the coverage of state action.

384. 487 U.S. 42 (1988).

385. *Id.* at 43-45 (plaintiff could not see any other physician because of his security classification).

386. *Id.* at 45.

387. *Id.*

388. *E.g., id.* at 49 (defining color of law), 49 (defining state action also as color of law), 49 (defining state action), 50-52 (reviewing tests for state action), 53 (discussing Estelle v. Gamble, 429 U.S. 97 (1976), in terms of color of law), 54 (discussing *Estelle* in terms of state action).

389. West v. Atkins, 487 U.S. 42, 56 & n.15. Whether or not the two terms are not synonymous is irrelevant to this inquiry with respect to informants. The goal here is simply to identify the tests currently in vogue so that in that application and extrapolation to the informant context can be reasonably and understandably accomplished. The original meaning of each distinct input must be given before the combination can be understood. *See* Lugar, 457 U.S. at 935 ("Although we hold that conduct satisfying the state action requirement of the Fourteenth Amendment satisfies the statutory requirement of action

1. The Meaning of "Under Color of" Law

In 1961, the Supreme Court resurrected the § 1983 cause of action for constitutional deprivations caused by state officials acting under color of state law. In *Monroe v. Pape*,[390] Chicago police entered the Monroe house without a warrant, "routed [the family] from bed," taunted them with racial epithets, and compelled them to stand naked while the police ransacked the house.[391] As a result of the search, detention and interrogation of Monroe, suit was filed pursuant to § 1983 alleging a violation of Fourth Amendment rights.

In reversing the dismissal of the suit, the Court grappled with and disagreed over the meaning of the phrase "under color of law." The majority adopted the meaning previously articulated in *United States v. Classic*[392] and held that "under color of law" includes wrongful acts made possible because the actor was "clothed with the authority of state law."[393] Thus, the mere privatization of otherwise official activity does not protect the actor from liability.[394] Historically, a major concern in the interpretation of "under color of" is in addressing the existence of false appearances and pretense, as well as the abuse of

under color of state law, it does not follow from that all conduct that satisfies the under color of law requirement would satisfy the Fourteenth Amendment requirement of state action."). Monroe v. Pape, 365 U.S. 167 (1961).

390. 365 U.S. 167 (1961).

391. *Id.* at 169, 203 (Frankfurter, J., discussing facts).

392. 313 U.S. 299, 326 (1941) ("power[ ] possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law").

393. *Id.* at 326, *quoted in Monroe*, 365 U.S. at 184. *See also* Woodward v. City of Worland, 977 F.2d 1392, 1400 (10th Cir. 1992) (discussing sexual harassment under color of law), *cert. denied*, 113 S. Ct. 3038 (1993); Skelton v. Pri-Cor Inc., 963 F.2d 100, 102 (6th Cir. 1991) (holding that private corporation administering state corrections facility was acting under color of law), *cert. denied*, 112 S. Ct. 1682 (1992); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 341-84 (1992) (detailing the proper historical meaning of the term), 407-18 (discussing the current Court's limitations on § 1983 liability based upon constricted construction).

394. *See, e.g.*, West v. Atkins, 487 U.S. 42 (regarding a prison doctor); *Skelton*, 963 F.2d 100 (regarding private corporation operating prison). *Compare* Yeager v. City of McGregor, 980 F.2d 337, 339-43 (5th Cir. 1993) (holding that maintaining a volunteer fire department was not a traditional and exclusive function of the state because they were historically private in Texas), *cert. denied*, 114 S. Ct. 79 (1993), *with* Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 214-19 (4th Cir. 1993) (finding no government lease and no extensive regulation of volunteer fire department, but remanding to determine if public function).

one's position.[395] The phrase itself applies to "the 'two-faced' quality of official misconduct."[396]

2. *The Meaning of State Action*

Prior to *Lugar v. Edmonson Oil Co.*,[397] the Supreme Court used three approaches to analyze whether state action existed: (1) the symbiotic relationship test; (2) significant encouragement or significant involvement in private conduct test; and (3) the exercise of traditional state functions test. In *Lugar*, the Court blended these three tests and created a two part "nexus" test.[398] The nexus, or balancing test, requires that the conduct be "fairly attributable to the State" and by "a person who may fairly be said to be a state actor."[399]

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395. Winter, *supra* note 393, at 328 ("*seems* to be lawful and authorized, but turns out not to be"), 346 ("the law historically has conveyed the special gravity of the offense that stems from the wrongdoer's abuse of his or her official status"). In Screws v. United States, 325 U.S. 91, 111 (1945), the Court characterized under color of law as under the "pretense" of law.

396. Winter, *supra* note 393, at 346, 384-407. Historically, both the English and American approaches to the meaning of under color of law include "unlawful but nevertheless official actions." Winter, supra note 393, at 351. The historical development of the term actually intersected with the history of informants during the fifteenth century and each has been subjected to manipulation since. Dive v. Manningham, 1 Plowden Rep. 60, 75 Eng. Rep. 96 (Common Bench 1551) (first reported in 1578) (discussing both compounding by informants and whether illegal release pursuant to a bail bond was under color of law). *See id.* at 342-46 & n.80.

397. 457 U.S. 922 (1982). Rendell-Baker v. Kohn, 457 U.S. 830 (1980), and Blum v. Yaretsky, 457 U.S. 991 (1982), were decided on the same day as *Lugar*.

398. Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-39 (1982).

399. *Id.* at 937. In addition, joint activity or a conspiracy between a private person and a state actor will bring the private individual into state action. Tower v. Glover, 467 U.S. 914 (1984) (regarding a public defender in a conspiracy with judges); Dennis v. Sparks, 449 U.S. 24 (1980) (regarding a conspiracy between other defendants and a judge); Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (regarding conspiracy/understanding between restaurant owner and local police); United States v. Price, 383 U.S. 787, 794 (1966) ("jointly engaged with state officials in the prohibited action . . . a willful participant in joint activity with the State or its agents").

To prove a conspiracy, the plaintiff must show an agreement to commit an unlawful act or a lawful act by unlawful means. In regard to informants, courts do not always find that such a meeting of the minds occurs. In the case of Gary Thomas Rowe, the Klan infiltrator, one court refused to find joint activity where the FBI knew in advance, from Rowe, that the local police were going to allow the Klan to beat the freedom riders for fifteen minutes without interruption. The FBI failed to take any action to deter or stop the beatings and Rowe was rewarded but never sanctioned for his participation in the beatings. Peck v. United States, 470 F. Supp. 1003, 1008, 1012 (1979) (finding insufficient pleadings for § 1983 or § 1985(3) conspiracy, but allowing possibility of showing failure to prevent private conspiracy actionable under § 1986). *But see Hanrahan*, 600 F.2d at 628 n.28 (1979) (finding sufficient evidence of § 1985(2) conspiracy where law enforcement officials conspired with informant to obstruct justice in a post-raid cover-up). *See also* Lomax v. Davis,

"Fairly attributable," according to the majority, may include a "deprivation . . . caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."[400] In addition, the state role and the allegedly unconstitutional act must be rationally linked under the symbiotic relationship test.[401] A symbiotic relationship relies upon the mutually beneficial nature of the relationship and the "private" actor as an integral component of the larger state.[402]

The "state actor" can be a state official, someone acting with a state official, someone acting with significant aid from a state official, or someone whose "conduct is otherwise chargeable to the State."[403] Recently, the Court described the question as "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual."[404] To determine whether a person is a state actor, courts examine factors common to the public function and state compulsion tests.[405] The public function approach focuses on what traditionally and exclusively has been the responsibility of the state and has been delegated or adopted by private persons.[406] In cases involving state employment, the Court focuses on whether the individual is obliged to the state, acts adverse to the state, is subject to direction by the state, and acts in a professionally independent manner.[407] The

571 F. Supp. 805 (N.D. Miss. 1983) (finding no conspiracy where informant planted drugs unbeknownst to the police, who then acted upon the tip).

400. *Lugar*, 457 U.S. at 937.

401. *See generally id.* at 937-38 (discussing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972), where the state liquor regulation of the private club was not related to the club's decision to discriminate). The *Lugar* Court drew upon the symbiotic relationship test in defining this factor. 457 U.S. at 938 n.19.

402. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (regarding a restaurant lease from state agency).

403. Lugar, 457 U.S. at 937.

404. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988).

405. *Lugar*, 457 U.S. at 939.

406. Under this test, the Court found private political associations, towns, and parks to be state functions. *See, e.g.,* Smith v. Allwright, 321 U.S. 649, 660 (1944) (private political associations); Marsh v. Alabama, 326 U.S. 501 (1946) (towns); Evans v. Newton, 382 U.S. 296, 302 (1966) (parks), but not shopping centers, utilities and private dispute resolution systems. Hudgens v. NLRB, 424 U.S. 507, 518-520 (1976) (shopping center); Jackson v. Metropolitan Edison Co., 419 U.S. 315, 353 (1974) (utilities); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 (1978) (private dispute resolution systems).

407. Polk County v. Dodson, 454 U.S. 312, 318, 321-23 (1981) (finding that a public defender is not a state actor because she was not obliged to the state, was in an adversarial position to the state, was not subject to state direction, and acted professionally independent of the state); *cf.* West v. Atkins, 487 U.S. 42, 51-56 (1988) (finding that a private doctor on contract with a prison is a state actor because the state had an obligation to provide medical care, the state delegated that function to the doctor, the doctor assumed the obli-

state compulsion or significant encouragement/involvement test requires a level of encouragement or involvement that exceeds the *de minimis* impact of regulation, acquiescence, and funding to constitute compelled action or involve some delegation of power.[408]

It is unclear whether the *Lugar* Court's articulation is a new test, supplanting the previous tests, or an alternative formulation of the pre-existing tests.[409] In *West*, a case decided after *Lugar*, the Court acknowledged the continued vitality of each of the previous three approaches.[410] Specifically, the Court in *West* found the defendant to be a state actor by considering the function, not the terms, of the prison doctor's employment and the delegation of obligation by the state.[411] Ultimately, the traditional nature of the state's role in providing medical care superseded the exclusivity requirement of the state function test.[412]

3. *The Resulting State Actor Test and Informants*

The critical elements to establishing a more balanced approach to informants involve a functional examination of the handler-informant relationship. If courts, in creating this balance, are interested in how

gation and, although the state deferred to the doctor's professional judgment, he was the exclusive source of medical treatment for certain prisoners).

408. *Jackson*, 419 U.S. at 358-59 (finding extensive regulation insufficient); *Flagg Bros.*, 436 U.S. at 164-66 (finding acquiescence in private action insufficient where state did not compel); *Rendell-Baker v. Kohn*, 457 U.S. at 830, 840-42 (finding receipt of 90% of funding insufficient where state did not compel challenged decision); Blum v. Yaretsky, 457 U.S. 991, 1011-12 (regarding mere responsiveness of the state); *Tarkanian*, 488 U.S. at 195-96 (finding no delegation of state power).

409. Whether this new test requires more than the pre-existing tests is uncertain. Although previously one could meet just one test for state action, now meeting just one test will only satisfy one prong of the nexus test. However, there is evidence that this is a new and different test. In *Tarkanian*, the Court interspersed the tests again, but also noted that prior to *Lugar* most lower courts had held that the NCAA was a state actor under § 1983. *Tarkanian*, 488 U.S. at 182 n.5. Following that decision, most lower courts held that it was not. *Id.*

410. *See* West v. Atkins, 487 U.S. 42, 49 (discussing nexus test), 51 (discussing symbiotic relationship noting the close cooperative relationship), 52 n.10 (discussing significant involvement noting the integration of professional standards through state regulation "either overt or covert"), 53-55 (discussing traditional function noting the state has responsibility for medical care and has chosen to allocate it through private contract). *See also* Blum, 457 U.S. at 1005-12 (discussing state regulation of and public funding for nursing home were insufficient to establish state action under the state compulsion, symbiotic relationship, or public function tests); Rendell-Baker, 457 U.S. at 838-43 (following *Lugar*, *Blum*, and three tests to find no state action). *See also* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503, 503-05 (1985).

411. *West*, 487 U.S. at 54-56.

412. *Id.* (finding exclusivity not necessary where state had historically, by common law requirement, provided medical care to prisoners).

the handler instructed the informant and whether the informant conduct at issue was consistent with or independent of that relationship, then the *Lugar* test provides a straightforward framework. The fairly attributable prong requires an exploration of the causal connection between the handler and the victim. The state actor prong, which bears some resemblance to "under color of law," analyzes the instructions to or empowerment of the informant by the handler. Within this framework, under color of law, state action and informants can come together.

VI. Showing Linkages Between Handlers and Informants

The realists' views are consistent with the history of informant use. The history of informant use, dating from early English common law, shows informants as an omnipresent element of the developing criminal justice system. Unifying history and law enforcement under the state action and color of law tests supports a presumptive linkage between informant and handler.

A. The History of Approver and Informant Use

The modern day conduct of jailhouse informants is deeply rooted in the history of the approvers and common informers.[413] Approvers and common informers were established, developed, and maintained throughout most of this millennium in England in a variety of incarnations.[414] Regardless of the technical and superficial differences in appearance between ancient approvers and modern informants, the method, spirit, and purpose of the ancient approver remain intact in its modern-day counterpart.[415] The inherent problems with each, in

413. The approvers are the predecessors of today's jailhouse informers, while the common informer is the distant relative of other, non-jailhouse informants.

414. Professor Langbein separates the common informers on misdemeanors from those reporting on felonies. John H. Langbein, *Shaping The Eighteenth Century Criminal Trial: A View From The Ryder Sources*, 50 U. CHI. L. REV. 1, 109 n.441 (1983). Although the practice of approvers was eventually abandoned, 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 226 (1847), Parliament continued to be influenced by the practice. United States v. Ford (Whiskey Cases), 99 U.S. 594, 599 (1878) [hereinafter *Whiskey Cases*].

415. Blackstone noticed this reliance on the reward system. After the practice of approvement was discontinued, he noted in detail:

> I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the case of coining, robbery, burglary, house-breaking, horse-stealing, and larciny to the value of five shillings from shops, warehouses, stables, and coach-houses, by statutes 4 & 5 W. & M. c. 8. 6 & 7 W. III c. 17. 10 & 11 W. III c. 23. and 5 Ann. c. 31. which enact, that, if any such offender, being out of prison, shall discover two or more persons, who

particular the unreliability of and abuse by the common informer or approver, and the lack of an effective means of control, are apparent from the earliest of times. In cyclical fashion, informants were embraced, touted, and utilized. Then, at the opposite end of the cycle, they were chastised, vilified, and restrained only to be embraced once again. This section summarizes the development of the use of each type of informant, the common informer and approver, and how these systems were operated, abused, and criticized, but steadfastly maintained.

1. The System of Approvers

In existence as early as 1275, the approver was "a convicted criminal who had obtained a pardon conditional on ridding the world of some half-dozen of his associates by his appeals."[416] To commence the approvement process, the indicted felon would confess the crime and then "impeach or accuse or appeal others of felony."[417] The appeal was the formal accusation an approver made against someone else.[418] A prisoner could only become an approver if he or she was charged with and confessed to treason or a felony, both capital of-

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have committed the like offences, so as they may be convicted thereof; he shall in case of burglary or housebreaking receive a reward of 40 *l.* and in general be entitled to a pardon of all capital offences, excepting only murder and treason; and of them also in the case of coining. And if any such person, having feloniously stolen any lead, iron, or other metals, shall discover and convict two offenders of having illegally bought or received the same, he shall by virtue of statute 29 Geo. II. c. 30. be pardoned for all such felonies committed before such discovery.

4 WILLIAM BLACKSTONE, COMMENTARIES *330-31. Thus, the practice of approvers and approvement became one with the practice of common informers.

416. 3 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 608 n.11 (quoting 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I *631). Courts had discretion to entertain an approver's appeal. 2 HALE, *supra* note 414, at 226.

According to the Statute of Westminster, an approver could not get bail. 3 Edw., ch. 15 (1275) (Eng.), *reprinted in* 1 STATUTES AT LARGE 45-46 (Owen Ruffhead ed., 1763); 4 HOLDSWORTH, *supra*, at 526. This remained so for roughly two centuries until relaxed. 3 Hen. 7, ch. 3 (1486) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* at 69-70. In 1554, because the standards resulted in "oftentimes by sinister Labour and Means set at large the greatest and notablest Offenders" the practice reverted back to the standards of 1275. 1 & 2 Phil. & M., ch. 13 (1554) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* at 484-85; 4 HOLDSWORTH, *supra*, at 527.

The approver was called a "probator" if he took the witness stand in process against an appellee because as a confessed felon he was not otherwise entitled to testify at trial. 2 HALE, *supra* note 414, at 234; *see* 4 BLACKSTONE, *supra* note 415, at *330-31.

417. 2 HALE, *supra* note 414, at 67; 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 429 (Samuel E. Thorne trans., 1968). The person accused was called the "appellee." 4 BLACKSTONE, *supra* note 415, at *330.

418. 4 BLACKSTONE, *supra* note 415, at *312.

fenses at the time.[419] Timing was essential to become an approver. An approver had to confess prior to the final presentation of the evidence at trial.[420]

Limitations also existed on the circumstances of an appeal. An approver could not appeal a felony that he or she had confessed to by retracting his confession and accusing another of the same crime.[421] Nor could the approver appeal an accessory to the crime.[422] An appeal, however, could be taken against the approver's felonious partner.[423]

The plea to become an approver usually occurred upon arraignment. A coroner was then assigned to the appeal.[424] The approver had several days to confess to the coroner. Any delay in confessing resulted in hanging.[425] Prior to the incorporation of indictments into the criminal process, the appeal of an approver could initiate a felony charge.[426]

Other constraints upon the approver existed. The court had the discretion to hear an appeal. Once the appeal was heard, the court issued a warning to the jury that it was dangerous to convict on this

419. 2 HALE, *supra* note 414, at 227-28 (suspicion of felony without indictment is not sufficient to become an approver); *see* 4 BLACKSTONE, *supra* note 415, at *330.

420. 4 BLACKSTONE, *supra* note 415, at *330; 2 HALE, *supra* note 414, at 228 (even with a plea of not guilty, the accused could confess prior to entry of all of the evidence, however, once convicted "he shall not be admitted to be an approver"). If all of the evidence was heard, but not the verdict, then the court's discretion governed acceptance as an approver. 2 HALE, *supra* note 414, at 228.

In addition, the person could become an approver in front of a justice of the king's bench, of gaol-delivery or in eyre, or in front of a bishop's justice, but not before an inferior court, a justice of the peace, oyer or terminer. The difference being that the latter could not assign a coroner to hear the appeal. 2 HALE, *supra* note 414, at 229; 2 BRACTON, *supra* note 417, at 436 (most of these lesser courts dealt with land disputes).

421. 2 HALE, *supra* note 414, at 227 ("if A. being indicted for robbing of B., and he appeal C., that he robbed A. himself, this is a void appeal, and the appellor shall be executed, and the appellee shall not be put to answer to it").

422. 2 HALE, *supra* note 414, at 227 ("if he appeal C. as accessary to the robbery of B., either before or after, C. shall not be put to answer, for it is not the same felony charged upon A. but only an accessary to it").

423. "A. of N., confessing that he is a thief, appeals B. of confederacy and theft (or 'robbery' or 'homicide') that is, that they together stole such a thing at such a place, so that the aforesaid B. had so much for his share." 2 BRACTON, *supra* note 417, at 431.

424. 2 HALE, *supra* note 414, at 229.

425. *Id.* at 230.

426. 3 HOLDSWORTH, *supra* note 416, at 609 (vague on exactly when this occurred). *See also* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.2, at 378 (2d ed. 1992) (equally unclear, but intimating the timing around the end of the fourteenth century).

evidence, especially if uncorroborated.[427] Once an approver appealed, the approver could not change the substance of the allegations.[428] Nor could the approver charge persons not in the kingdom or not where the approver alleged them to be.[429] Further, everything the approver alleged had to be true.[430]

In response to the accusation, the appellee could choose to personally fight the approver or be tried upon the accusation.[431] In the end, an unsuccessful appeal would result in the execution of the approver.[432] Otherwise, upon receipt of the king's pardon, the approver was free but had to leave the country.[433]

2. *Problems in the Approver System*

Many entered the approver system, because the fate of a false approver was no worse than the fate of a convicted non-approver. Further, the problems with the approver system were numerous. The prisoners who took appeals as approvers were viewed as manipulative, abusive, and desperate.[434] Questions existed as to the credibility

427. 4 BLACKSTONE, *supra* note 415, at *330; 9 HALSBURY'S LAWS OF ENGLAND 222 (2d ed.).

428. If, after confessing, the coroner confirmed a waived appeal and the approver disavowed the appeal, the approver was hanged. 2 HALE, *supra* note 414, at 230. Similarly, if upon repetition of his appeal to the court he misstated it, then the approver was hanged. *Id.* The coroner's credibility exceeded that of the approver. 2 BRACTON, *supra* note 417, at 429.

Hale cited the wrong color of a horse as grounds to believe that the appeal was feigned. 2 HALE, *supra* note 414, at 230. "The approver must describe some specific thing and all the circumstances, without any variance or alteration, and must recognize the appellee when he is produced in court, for if he does not it will be presumed that they were never confederates." 2 BRACTON, *supra* note 417, at 431.

429. 2 HALE, *supra* note 414, at 230, 231 (In either event, the approver was hanged).

430. *Id.* at 231 ("for if he be once found false in what he saith, he shall not be credited in any thing"). If the action proceeded nevertheless, for instance in the circumstance of an approver's disavowal, then the king could evaluate the evidence adduced and decide to proceed against the appellee. *Id.* at 232. However, if the appeal was not commenced or if the approver was pardoned, then the appeal was discharged. *Id.*

431. 4 BLACKSTONE, *supra* note 415, at *330 ("he must put himself upon his trial, either by battel, or by the country").

432. 2 HALE, *supra* note 414, at 234. Essentially, the approver had confessed to a capital crime and this was seen merely as carrying out the sentence. 2 BRACTON, *supra* note 417, at 430. "[F]or the condition of his pardon has failed, *viz.* the convicting of some other person, and therefore his conviction remains absolute." 4 BLACKSTONE, *supra* note 415, at *330.

433. 2 HALE, *supra* note 414, at 235; 2 BRACTON, *supra* note 417, at 433.

434. Hale described them as follows: "[T]he truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders . . ." 2 HALE, *supra* note 414, at 226. Only people who were in frankpledge did not have to answer to the

of the approver who stood to profit from the accusations. Further, approvers could blackmail innocent people with threats to pursue "trumped up" charges.[435]

The abuses even extended beyond the persons who initially stood accused. Sheriffs, jailers, and prison keepers would compel prisoners to become approvers and accuse innocent persons to extort ransoms.[436] According to Hale, the practice of approvement became obsolete by the close of the medieval period.[437] Although the formal system of approvers was abandoned, the underlying characteristics were incorporated into the surviving common informer system.[438] In addition, the basic premise of negotiating with the prosecution for relief based upon turning in evidence of others' criminal activity persisted.

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accusations of an approver. 2 POLLOCK & MAITLAND, *supra* note 416, at 631; 2 BRACTON, *supra* note 417, at 429 (noting that those who have a lord to avow them are also beyond appeal).

435. 2 HALE, *supra* note 414, at 226. While much of the criticism of approvers was either general or anecdotal, the continuous criticism and subsequent abandonment of the process were testament to the troubles caused. In 1274 an approver proceeded against 13 honest men and extorted 40 shillings, threatening to use others as approvers against the townspeople. United States v. De Cavalcante, 440 F.2d 1264, 1270 n.7 (3d Cir. 1971).

Holdsworth told of one prisoner in 1445, Janycoght de Gales, who owed 388£ 3s 4d and procured an approver, George Grenelawe, to appeal him of larceny—that is accuse someone else of the offense. Later, Grenelawe confessed to the collusion. 2 HOLDSWORTH, *supra* note 416, at 459.

That practice ended by passage of a statute stating that "no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide*." 3 BLACKSTONE, *supra* note 415, at *160 (discussing 4 Hen. 7, ch. 20 (1487) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 78-79). This apparently treated such outcomes as acquittals, allowing reprosecution. 3 BLACKSTONE, *supra* note 415, at *161.

436. 2 HOLDSWORTH, *supra* note 416, at 457-58 (noting that 1 Edw. 3, ch. 7 (1327) (Eng.), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 190-91, acknowledged that this practice existed and involved torture—"have pained their Prisoners"—to obtain the prisoner's compliance). In 1340, a statute was enacted to prevent these abuses and prohibit the practice. 14 Edw. 3, ch. 10 (1340) (Eng.), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 226; 4 BLACKSTONE, *supra* note 415, at *128-29. However, later statutes acknowledged the persistence of the jailer abuses. 1 Edw. 4, ch. 2 (1461) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 6.

437. 2 HALE, *supra* note 414, at 226. Although it bore great resemblance to the practice of king's evidence or king's mercy, both used during the Sixteenth and Seventeenth Centuries, under the latter practice an unsuccessful "appeal" resulted in prosecution, not death. *Whiskey Cases*, 99 U.S. at 599.

438. *Whiskey Cases*, 99 U.S. at 599.

3. *The Common Informer System and Abuses in Great Britain*

The common informer was "a person who brought certain transgressions to the notice of the authorities and instituted proceedings, not because he, personally, had been aggrieved or wished to see justice done, but because under the law he was entitled to a part of any fine which might be imposed."[439] Based upon that information, the informer instituted a civil *qui tam* action.[440] Once commenced, no one, including the king, could pursue an action based on the same illegal act.[441]

The justifications for the use of common informers have changed and adapted. In the absence of organized police forces,[442] it was argued that the common informers were an evil necessary to crime control.[443] However, the informer system persisted even after crime was

439. 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM *1750* 138 (1948-1968) (5 vols.). Blackstone explained the situation in this way:

> The same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party aggrieved, or else to any of the king's subjects in general.... But, more usually, these forfeitures created by statute are given at large, to any common informer; or in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general.

3 BLACKSTONE, *supra* note 415, at *159-160.

The earliest record of the payment method, 1692, found that the informer was issued a judge's certificate for the money due. Langbein, *supra* note 414, at 107. These became known as "blood money certificates." *Id.*

440. This action is brought by a person who sues for himself, as well as on behalf of the king. 3 BLACKSTONE, *supra* note 415, at *160; 8 OXFORD ENGLISH DICTIONARY 72 (1933) (listed under "qui tam").

441. 3 BLACKSTONE, *supra* note 415, at *160. The statute of limitations on a *qui tam* (informer's) action, however, was one year. In contrast, the king had two years within which to file and seek the penalty. 4 HOLDSWORTH, *supra* note 416, at 525. So effective were these actions that often offenders would have a friend commence a *qui tam* action. 3 BLACKSTONE, *supra* note 415, at *160.

442. 2 HOLDSWORTH, *supra* note 416, at 453. Organized police forces did not appear in England until the early Nineteenth Century. 12 HOLDSWORTH, *supra* note 416, at 232; Langbein, *supra* note 414, at 114.

443. 11 HOLDSWORTH, *supra* note 416, at 552. *But see id.* at 552 & n.10 (*citing* CESARE B. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS ch. 36 (David Young trans., 1986)). Another theory behind their use was the expedience of the criminal information over the indictment. 9 HOLDSWORTH, *supra* note 416, at 240-41. *See, e.g.*, 11 Hen. 7, ch. 3 (1494) (Eng.) (allowing judges of assize and justices of the peace to hear any non-capital offense), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 82 (which was repealed in 1509 due to abuses in 1 Hen. 8, ch. 6 (1509) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 108). When the indictment replaced the information for most felonies,

controlled through the use of police and indictments. The use of the common informer persisted due to a lack of interest and disdain for resolving the weaknesses of informers, the institutionalization of the use of informers, and the informers' ability to adapt to the times.

Common informers, like approvers, abused their positions, and the government was similarly frustrated in its attempts to control their activity.[444] On a near cyclical basis, statutes were created granting informers benefits, and then later limited by penalizing informer misconduct. Throughout the centuries, varying with the need for and criticism of common informers, a wide variety of statutes incorporated informers into the legal process and gave them rewards for their contributions and labors. These statutes regulated land, vagrancy, commerce, and even the military.[445]

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however, common informers were still used to obtain felony indictments. 9 HOLDSWORTH, *supra* note 416, at 242-44 (discussing the preference for indictments in the mid to late 1600s). This was potentially a full half century prior to the earliest date cited by Langbein for the use of informers for felony charges. Langbein, *supra* note 414, at 106. Langbein places 1692 as the beginning of the rewards system in England. *Id.* He distinguished previously existing *qui tam* actions as involving only regulatory matters and misdemeanors, not felonies. *Id.* at 109 n. 441. This neat line of division may be suitable for his purposes; however, it places more finiteness where there is obscurity and overlap. For example, in 1589, Parliament enacted "An Act to avoid Horse-Stealing." 31 Eliz. ch. 12 (1589)(Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 669-70. Under the Act, an accessory to the sale of a stolen horse was subject to both felony prosecution and an informer action, where "one Half of all which Forfeitures to be to the Queen's Majesty, her Heirs and Successors, and the other Half to him or them that will sue for the same." 31 Eliz. ch. 12 §§ 2, 4, reprinted in 2 STATUTES AT LARGE, *supra* note 416, at 669-70. *See also* 8 Hen. 6, ch. 9 § 5 (1429) (Eng.) (justices can hear claims for unlawful entry upon land "[a]nd if the Sheriff or Bailiff be duly attained in this Behalf by Indictment, or by Bill, that he which sueth for himself and for the King have the one Moiety of the Forfeiture of [twenty pounds] together with his costs and expenses"), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 408-10. No doubt the informer who sued would also play a role in any felony prosecution. Thus, in reality, each of these systems, whether approver, felony informer or *qui tam* prosecutor, bore too many common characteristics that persist throughout the centuries and continue to infect their present-day relatives.

444. By statute, in 1589, common informers were described as persons who "daily unjustly vexed and disquieted" the Queen's subjects. 31 Eliz., ch. 5 (1589) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 660-61.

445. 2 RADZINOWICZ, *supra* note 439, at 140. The statutes included 23 Hen. 8, ch. 9 (1531) (Eng.) (regulations on Archbishop's courts imposing a fine of 10 pounds sterling, to be divided equally between informer and the Crown), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 170-71; 31 Eliz., ch. 6, § 10 (1589) (Eng.) (offense for official of church, college or hospital to receive money to vacate the office imposing a fine of 40 pounds where the informer received half), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 661-63; 1 Edw. 6, ch. 3 (1547) (Eng.) (punishing city or town for allowing vagrants or vagabonds where informer shared the fine, the convicted pauper was branded and given to the informer as a slave for two years), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 386 (text in Appendix). This last statute was repealed two years later. *See* C. J. RIBTON-

Common informers devised ways to gain benefits through less effort. For example, informers would agree "not to prosecute or to inform on one who has committed a crime" in exchange for money, property, or some other consideration.[446] As a result, compounding

TURNER, A HISTORY OF VAGRANTS AND VAGRANCY AND BEGGARS AND BEGGING 89-94 (1887).

Other statutes involving informers were directed at commerce. 2 RADZINOWICZ, *supra* note 439, at 140 n.15; 9 HOLDSWORTH, *supra* note 416, at 239-240. These statutes included 5 Edw. 3, ch. 5 (1331) (Eng.) (prohibiting stallholders from selling after the close of the fair upon penalty of double the value of the goods sold, the informer receiving "the fourth Part of that which shall be lost"), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 208; 9 Edw. 3, ch. 1 (1335) (Eng.) (prohibiting the disturbance of merchants), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 212-14; The Statute of Cloths, 25 Edw. 3, ch. 2 (1350) (Eng.) (same), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 259-260; 4 Hen. 4, ch. 20 (1402) (Eng.) (customs officer embezzlement), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 452; 2 Hen. 6, ch. 14 (1423) (Eng.) (prohibiting the sale of unmarked silver wares), *reprinted in id.* at 529-530; 3 Hen. 6, ch. 3 (1424) (Eng.) (penalty for customs officer embezzlement is "the treble Value of the Merchandises. . . . And he that will sue, shall have the Third Part for his Labour."), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 532; 28 Hen. 6, ch. 4 (1449) (Eng.), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 621 (see Appendix); 28 Hen. 8, ch. 5 (1536) (Eng.) (protecting apprentices), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 253-54; 32 Hen. 8, ch. 9 (1540) (Eng.) (regulating the purchase and sale of land, fine of ten pounds), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 280-81; 33 Hen. 8, ch. 27 (1541) (Eng.) (regulating the sale and leasing of property, fine of five pounds), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 321-22; 2 & 3 Phil. & M., ch. 7 (1555) (Eng.) (prohibiting the purchase of stolen horses), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 490-91; 5 Eliz., ch. 9, § 3 (1562) (Eng.) (expanding fine to forty pounds on regulation of purchase of land), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 550; 18 Eliz., ch. 9 (1576) (Eng.) (prohibiting the export of leather), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 617-18; 31 Eliz., ch. 12 (1589) (Eng.) (prohibiting sale and purchase of stolen horses), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 669-670; 6 Anne, ch. 31, § 1 (1707) (Eng.) ("the Churchwardens of such Parish so making Default, and being convicted thereof . . . shall forfeit and pay the Sum of ten Pounds, one Moiety thereof to the Informer, and the other Moiety to the Overseers of the Poor of the Parish"), *reprinted in* 4 STATUTES AT LARGE, *supra* note 416, at 325; 2 Geo. 2, ch. 25 (1729) (Eng.) (punishment of forgery), *reprinted in* 5 STATUTES AT LARGE, *supra* note 416, at 699-700; 8 Geo. 2, ch. 16, § 9 (1735) (Eng.) (reward for apprehending felons), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 188; 15 Geo. 2, ch. 28, § 7 (1742) (Eng.) (reward for conviction of counterfeiters), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 464-65; 16 Geo. 2, ch. 15, § 3 (1743) (Eng.) (easy conviction of offenders at large), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 500-01; 8 Geo. 3, ch. 15 (1768) (Eng.) (providing for transportation of prisoners), *reprinted in* 10 STATUTES AT LARGE, *supra* note 416, at 453-54. *See also* 6 HOLDSWORTH, *supra* note 416, at 405-06; 4 BLACKSTONE, *supra* note 415, at *295.

On the military, *see* 2 RADZINOWICZ, *supra* note 439, at 63 n.29. An informant who gave information about the military was rewarded by one of the statutes with "one Month's Wages of him that shall be found faulty." 2 & 3 Edw. 6, ch. 2, § 12 (1548) (Eng.) (felony crimes include, *inter alia*, allowing soldier to depart, taking another for gain, retaining wages, and departing without leave), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 408-10. This statute was repealed in 1863. 26 & 27 Vict., ch. 125 (1863) (Eng.), *reprinted in* 44 STATUTES AT LARGE, *supra* note 416, at 312-13.

446. BLACK'S LAW DICTIONARY 259 (5th ed. 1979).

deals were made between informers and sheriffs (the jailers of the time), as well as between sheriffs and prisoners. Compounding involved money, property, or the marriage of an heir.[447] In response to this extortion, statutes limited the sheriff's term of service.[448] Nevertheless, the practice continued. For instance, the Crown issued commissions authorizing the holder to find violations of the law, to institute the necessary proceedings, and to receive a share of the penalty.[449] These commission holders were specifically allowed to compound and did not have to observe the statutes.[450]

After much criticism,[451] the practice of compounding was prohibited in 1576, when it became punishable as a misdemeanor.[452] As a result, anyone who charged without permission of a court or sought money from the defendant to drop the charges had to forfeit ten pounds, stand for two hours in the pillory, and was forever unable to

447. In Dive v. Maningham, 75 Eng. Rep. 96, 1 Plowden Rep. 60 (1551), the court discussed compounding prior to 1444:

> . . . where a man was condemned in any sum, and in execution for it, the sheriffs or other officers would let him at large upon condition to save them harmless; as if he had been condemned in £100, the sheriff or other officer would take an obligation of £300 . . . . And sometimes the sheriff or other officer would for such favour gain a piece of land, sometimes he would compound with the prisoner by this means to get his son and heir married to his own daughter, and he never was without great reward for such favour. And so sheriffs and other officer by such crafts and devices were enriched . . . .

Id. at 107, 1 Plowden Rep. at 67.

448. 14 Edw. 3, stat. 1, ch. 7 (1340) (Eng.) (limit term to one year because "they be encouraged to do many Oppressions to the People"), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 224-25; 23 Hen. 6, ch. 7 (1444) (Eng.) (same because of the "many and divers Oppressions to the King's liege People"), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 606-08; 23 Hen. 6, ch. 9, § 1 (1444) (Eng.) (same "considering the great Perjury, Extortion, and Oppression which be and have been in this Realm by his Sheriffs, Under-Sheriffs, and their Clerks, Coroners, Stewards of Franchises, Bailiffs, and Keepers of Prisons, and other Officers in divers Counties"), *reprinted in* 1 STATUTES AT LARGE, *supra* note 416, at 608.

449. 4 HOLDSWORTH, *supra* note 416, at 357; 10 HOLDSWORTH, *supra* note 416, at 233 & nn.1-2.

450. 4 HOLDSWORTH, *supra* note 416, at 357 & nn.3-4, 358 & nn.4-5 (giving examples of one who did not have to follow the penal statutes relating to the leather trade, the wool trade, the importation of playing cards).

451. Many, including Coke, were vehemently against this sort of favoritism, calling such dispensations "utterly against law." *Id.* at 358 & n.5.

452. 18 Eliz., ch. 5, § 3 (1576) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 613-14. This act was subsequently made perpetual. 27 Eliz., ch. 10, § 1 (1585) (Eng.) ("since the making of the same Act to be very necessary, beneficial and expedient for the Commonwealth"), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 644; 31 Eliz., ch. 5 (1589) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 660-61.

sue under any statute.[453] Another statute entitled all defendants to appear by attorney when "informed against upon any penal Law."[454]

This brief reaction against the common informers was neither sufficient to quell abuses nor completely sincere. In 1589 "all former Statutes made for Reformation of Disorders of such common Informers, not repealed or altered by this Act, shall be put in due Execution: . . . that no Person, other than the Party grieved . . . shall be received to inform or sue upon any Penal Statute."[455] However, the statute of 1589 carved out exceptions for officers of record and for offenses where information could be given in any county.[456] Further, the common informer's ability to prevent others from bringing actions was held illegal in 1605 in the *Case of the Penal Statutes,*[457] where the court labelled such acts as an abuse of the trust of the people.[458] Statutes then required informers and relators to take an oath upon their information.[459]

However, none of these constraints addressed the problems arising from the large grant of authority to persons acting on behalf of the government, nor the payment of rewards for successful information.[460] While placing limits on common informers, statutes approved the appointment of aulnagers, government persons who were to investigate

453. 2 RADZINOWICZ, *supra* note 439, at 315.

454. 29 Eliz., ch. 5, § 21 (1587) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 655.

455. 31 Eliz., ch. 5, § 1 (1589) (Eng.), *reprinted in* 2 STATUTES AT LARGE, *supra* note 416, at 660.

456. 31 Eliz., ch. 5, §§ 3 & 4 (1589) (Eng.), *reprinted in* 2 STATUTES AT LARGE *supra* note 416 at 661.

457. 7 Co. Rep. 36 (1605). 4 HOLDSWORTH, *supra* note 416, at 357-58 & 358 n.6. In addition, the informer could "interfere" with any cause of action that sought the penalty. Holdsworth analogized the abuse in giving informer's this status with granting a monopoly. *Id.* at 358.

458. 4 HOLDSWORTH, *supra* note 416, at 358-9. The judges held that:

> . . . if by the industry and diligence of any there accrueth any benefit to His Majesty [the King may reward such a person; but] that when a statute is made by Parliament for the good of the commonwealth, the king cannot give the penalty benefit and dispensation of such Act to any subject; or give power to any subject to dispense with it . . . for when a statute is made *pro bono publico*, and the King . . . is by the whole realm trusted with it; this confidence and trust is so inseparably joined and annexed to the Royal power of the King in so high a point of Sovereignty that he cannot transfer it to the disposition or power of any private person or to any private use.

Id. (quoting Case of the Penal Statutes, 7 Co. Rep. 36).

459. 21 Jam. 1, ch. 4, § 3 (1623) (Eng.) (oath that the offense did occur, did not occur in another county and that the offense occurred within the last year), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 94.

460. 4 HOLDSWORTH, *supra* note 416, at 359.

illegalities in a particular industry.[461] Not surprisingly, these officials also abused their positions until this practice ended in 1640.[462] Thereafter, business monopolies flourished and the only enforcement lay with the people, or the common informer.[463] As a result, more legislation encouraged the intervention of informers.[464]

In the late seventeenth century, societies in England took upon themselves the enforcement of laws on temperance and vice. These societies embraced the use of common informers, in utter disregard of the criticisms regarding reliability and the lure of a share of the penalty.[465] The statutes again strongly supported this use, offering large compensation to informers in the areas of gaming, lotteries, and disor-

461. *Id.* (referencing the appointment of Aulnagers in drapery (1594 and 1605), lead (1619), silk (1639), coal, and ale houses).

462. *Id.* at 360 (citing 16 Car. 1, ch. 19 (1640) (Eng.), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 141-42).

463. 4 HOLDSWORTH, *supra* note 416, at *360.

464. 2 RADZINOWICZ, *supra* note 439, at 141 n.20 (citing 6 HOLDSWORTH, *supra* note 416, at 332); 1 Jam. 1, ch. 5 (1604) (Eng.) (overcharging by stewards, fine of forty pounds with "[one] Half to any of his Majesty's Subjects that shall complain in any of his Highness Courts"), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 5; 13 & 14 Car. 2, ch. 26, § 6 (1662) (Eng.) (butter and cheese trade, half the fine to the informer), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 260; 4 W. & M., ch. 7, § 7 (1692) (Eng.) (same), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 516; 5 W. & M., ch. 20, § 14 (1694) (Eng.) (beer and liquor duties), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 560; 8 Will. 3, ch. 8 (1696) (lending of money), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 639-40.

465. 2 RADZINOWICZ, *supra* note 439, at 5-6, 13 n.49, 15. The Gin Act of 1736 was one such statute. 9 Geo. 2, ch. 23 (1736) (Eng.), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 217-221. Shortly thereafter, a statute was enacted criminalizing assault of an informer punishable by transportation for 7 years. 11 Geo. 2, ch. 26, §§ 1, 2, 7 & 8 (1738) (Eng.), *reprinted in id.* at 305-08. The societies would obtain blank warrants for the offenses in which they were particularly interested. The warrants were given to agents, who received information from informers and filled in the form. The agent then had the informer deliver the warrant to a magistrate who approved it. The informant returned the warrant to the agent who then delivered it to the constable. 2 RADZINOWICZ, *supra* note 439, at 14.

derly houses.[466] Most of these societies suffered and eventually failed, largely as a result of the disrepute of the informers.[467]

In the eighteenth century, informers again prevailed. Common informers received rewards for policing commerce, such as turning in information about dishonest merchants.[468] So vast had this informer system become that one commentator said "[i]t formed part of the deliberate and consistent policy of the legislature and pervaded the entire body of the criminal law."[469] In 1722 legislation was enacted to compensate persons injured or killed while informing.[470] Common in-

466. 2 RADZINOWICZ, *supra* note 439, at 142 & n.23. These statutes offered rewards up to 200 pounds. 12 Geo. 2, ch. 28 (1739) (Eng.), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 359-62; 25 Geo. 2, ch. 36, § 2 (1752) (Eng.) (up to 100 pounds for conviction of running a disorderly house without a license), *reprinted in* 7 STATUTES AT LARGE, *supra* note 416, at 438; 30 Geo. 2, ch. 24 (1757) (Eng.) (ten shillings first conviction and two pounds ten shillings for the second), *reprinted in* 8 STATUTES AT LARGE, *supra* note 416, at 73-80; 42 Geo. 3, ch. 119 (1802) (Eng.) (500 pounds for illegal game or lottery conviction and 100 pounds for conviction on offering sale of houses, goods or lands by lottery), *reprinted in* 19 STATUTES AT LARGE, *supra* note 416, at 609-611. *But see* 4 & 5 W. & M., ch. 18 (1692) (Eng.) (allowing defendants who are found not guilty or not tried to recover costs against informants), *reprinted in* 3 STATUTES AT LARGE, *supra* note 416, at 525; 9 Anne, ch. 20, § 5 (1710) (Eng.) (allowing costs against relators), *reprinted in* 4 STATUTES AT LARGE, *supra* note 416, at 470.

467. 2 RADZINOWICZ, *supra* note 439, at 16 & n.68 (noting one society that survived hired informers full-time, more like detectives).

468. *Id.* at 142-143; *see also* 22 & 23 Car. 2, ch. 8, § 15 (1670) (Eng.) (regulating weavers), *reprinted in* 3 STATUTES AT LARGE, *supra* note 439, at 357; 11 & 12 Will. 3, ch. 15, § 6 (1700) (Eng.) (shorting on ale), *reprinted in* 4 STATUTES AT LARGE, *supra* note 416, at 53; 31 Geo. 2, ch. 29 (1757) (Eng.) (adultering meal, flour or bread), *reprinted in* 8 STATUTES AT LARGE, *supra* note 416, at 255-74. Other areas that offered promise for informers included laws governing hackney coaches, 2 RADZINOWICZ, *supra* note 439, at 144, hawkers and peddlers, *id.*, pawnbrokers, *id.*, 25 Geo. 3, ch. 48 (1785) (Eng.), *reprinted in* 14 STATUTES AT LARGE, *supra* note 416, at 653-55; 39 & 40 Geo. 3, ch. 99 (1800) (Eng.), *reprinted in* 19 STATUTES AT LARGE, *supra* note 416, at 451-61, and other revenue offenses. RADZINOWICZ, *supra* note 439, at 142-43. *See also id.* at 144-145 & nn. 35-48; 17 Geo. 2, ch. 5 (1743) (Eng.) (vagabonds), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 514-23; 6 Geo. 3, ch. 48 (1766) (Eng.) (injuring or taking plants from cultivated lands), *reprinted in* 10 STATUTES AT LARGE, *supra* note 416, at 260-62; 10 Geo. 3, ch. 18 (1770) (Eng.) (buying, selling or detaining stolen dogs), *reprinted in id.* at 668-69; 28 Geo. 3, ch. 48 (1788) (Eng.) (taking too young an apprentice chimney sweep), *reprinted in* 15 STATUTES AT LARGE, *supra* note 416, at 499-502. Jonathan Wild is credited with organizing London's underworld, returning stolen property for large rewards and sending more than 100 persons to the gallows. MARX, *supra* note 14, at 19-20 & n.6 (and sources cited therein).

469. 2 RADZINOWICZ, *supra* note 439, at 146. He concluded: "It acquired the character of a regular system in process of continual expansion. The result was a social situation in which the common informer was expected to act as a policeman, and as a protector of the community against a vast mass of delinquency." *Id.* at 146-47.

470. 11 HOLDSWORTH, *supra* note 416, at 552 & n.12; *see also* 5 Anne, ch. 31, § 2 (1706) (Eng.) (discovering housebreaker), *reprinted in* 4 STATUTES AT LARGE, *supra* note 416, at 264; 9 Geo. 1, ch. 22, § 12 (1722) (Eng.) (concealed weapons), *reprinted in* 5 STATUTES AT LARGE, *supra* note 416, at 461-62.

formers became specialized, were described as "ruthless and unprincipled," targeted certain areas, and profited greatly.[471] One pamphlet of the era accused solicitors of encouraging common informers to overcharge felonies to "bring them within the ambit of the reward statutes."[472]

The resulting backlash against the common informer ultimately failed because the legal system gave new protection to informers. For example, the Gin Act of 1736[473] virtually outlawed drinking. The common informers' use of the Gin Act turned public sentiment against informing so that "the people thought all informations malicious," "began to declare war against informers," and attacked and killed informers in the streets.[474] After abandoning the Gin Act, the legal system gave informers penal protection by specifically criminalizing attacks upon anyone who gave or was about to give evidence against another.[475]

This imbalance of process remained a part of the criminal process in England throughout the eighteenth and nineteenth centuries. Furthermore, scandals involving common informers recurred regularly.[476] For example, in the early 1800s, informers enforcing insurance laws could recover before two magistrates and charge the wrongdoers with several penal violations, each rewarding the informer.[477] The sheriffs

471. 2 RADZINOWICZ, *supra* note 439, at 147. Some statutes, from which particularly good profits could be reaped, were known as "theirs." *Id.* (quoting J. Wade, Treatise on the Police and Crimes of the Metropolis 302 (1829)). Either the statute, or blackmail and extortion for not reporting the violations, were the source of revenue. These informers wrote into the laws their own "due" for finding the offense. *Id.* Threats of blackmail were documented in one pamphlet detailing the scheme. Langbein, *supra* note 414, at 110 n.442.

472. *Id.* at 108-09 n.441.

473. 9 Geo. 2, ch. 23 (1736) (Eng.), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 217-21.

474. 2 RADZINOWICZ, *supra* note 439, at 147 (quoting Lord Bathurst's Speech in 1743. Parl. Hist. (1741-1743), vol. 12, Feb. 15-21, 1943).

475. 11 Geo. 2, ch. 26, § 2 (1738) (Eng.) (transportation for seven years for anyone, in a group of five or more, for assaulting, beating or wounding someone who has given or is about to give evidence against another), *reprinted in* 6 STATUTES AT LARGE, *supra* note 416, at 306.

476. 2 RADZINOWICZ, *supra* note 439, at 148-155. In *Rex v. M'Daniel*, 19 State Trials 746 (1755), *noted in* 11 HOLDSWORTH, *supra* note 416, at 552. Two prisoners were alleged to have suborned two persons to commit a robbery so that the prisoners could get the reward for their apprehension. *Id.* More recent reporting of the same incident tells of a larger conspiracy to use confederates to set up an individual as the accused, then collect the reward. Langbein, *supra* note 414, at 105-06. The MacDaniel incident added to, or created additional, anti-informer sentiment. *Id.* at 113-14.

477. 2 RADZINOWICZ, *supra* note 323, at 148-9.

of London, in response, wrote to the House of Commons complaining of this abuse.[478]

In *Rex v. Crisp*,[479] the court limited the scope of the 250 year-old proscription on compounding[480] by excluding offenses cognizable only before magistrates in their "summary jurisdictions."[481] Although a later report recommended reversing *Crisp*, no action was taken.[482] As a result, common informers could and did extort money in exchange for not reporting people.[483]

The advent of the metropolitan police force in 1829, and their criticism of the use of common informers renewed and reinforced societal criticism on the subject.[484] Many suggestions for reform were made, including giving magistrates discretion to lower the informer's share of the reward, prohibiting compounding of informations, requiring informers to be licensed, and making them give security in case their allegations proved false.[485] Still, Parliament did not act. Abuses increased as common informers banded with police officers to prevent competition from other informers.[486] Only ten years later did Parliament address such abuses by granting magistrates discretion to reduce or deny the penalty and thereby reduce the informer's share.[487] Common informers, however, continued to outstep their critics.[488]

This cycle of schizophrenic treatment of informers continued into the first half of the twentieth century. For example, forty-eight informer statutes remained in force until 1951, only one-quarter of

478. *Id.*

479. 106 Eng. Rep. 104, 1 B. & Ald. 282 (1818).

480. *See supra* notes 446-453.

481. Rex v. Crisp, 166 Eng. Rep. at 105, 1 B. & Ald. at 284 ("The object of the Legislature by that law, was to render the punishment of crimes more certain, and this will equally apply to offences cognizable before justices as to those which are cognizable before superior jurisdictions.").

482. 2 RADZINOWICZ, *supra* note 439, at 315-406.

483. *Id.* at 151.

484. *Id.* at 153.

485. *Id.* at 154.

486. *Id.* at 151.

487. Metropolitan Police Courts Act, 2 & 3 Vict., ch. 71, § 34 (1839) (Eng.), *reprinted in* 33 STATUTES AT LARGE, *supra* note 416, at 224; 17 COMPENDIOUS ABSTRACTS OF THE PUBLIC GENERAL ACTS FROM THE LAW JOURNAL 1839-41, 185, app. xii. (1839).

488. 2 RADZINOWICZ, *supra* note 439, at 152.

which were enacted between 1825 and 1895.[489] All statutes involving common informers were repealed in 1951.[490]

4. Bringing The Informer System to the United States

The English informer system arrived with the colonists in the earliest days, and flourished.[491] In the first Congress, legislation gave rewards to informers for violations by customs officers.[492] Since this time, the informant system has grown and developed in the United States. The current form of approvement in the United States is the cooperation of criminally charged persons in police investigations. Despite historical experience, many courts in this country believe that such cooperation is too sophisticated or sufficiently developed to repeat past abuses.[493] To other courts, the incorporation of approvement has been too subtle to recognize.[494] Regardless of the historical influence, current *qui tam* actions merely give courts an opportunity to present some history.[495]

Traditional problems that plagued the informants systems in England persist in the modern United States criminal justice system. For example, there was certainly a high level of informant activity and abuse in the 1960s and 1970s, involving organized crime, the Klan, and

489. *Id.* at 155 n.76. "It is not a flattering testimony to the adequacy of our law-enforcement that for over five hundred years we have felt it necessary to set the law in motion by this means." SIR CARLETON KEMP ALLEN, THE QUEEN'S PEACE 90 (1953), (quoted in 2 RADZINOWICZ, *supra* note 439, at 155 n.76).

490. 14 & 15 Geo. 6, ch. 39 (1951) (Eng.) ("An Act to abolish the common informer procedure"), *reprinted in* PUBLIC GENERAL ACTS OF 1951 151-54.

491. Marvin v. Trout, 199 U.S. 212, 225 (1905) ("[S]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government."). In *Marvin*, the Court recognized the vitality and importance of the informer history to the law enforcement practices in this country. For examples, *see* Donnelly, *supra* note 5 at 1091-92 n.6 (areas include narcotics, protection of contract laborers, protection of Indians and fraudulent claims against the United States).

492. *See, e.g.*, Sess. 1, ch. 5, § 8, 1 Stat. 38 (1789) (violator must pay $200 "to the use of the informer"); Sess. 1, ch. 5, § 29, 1 Stat. 45 (1789) (violator must pay $100 plus costs "to the use of the informer"); Sess. 1, ch. 5, § 38, 1 Stat. 48 (1789) (one moiety to the informer).

493. *See, e.g.*, *Whiskey Cases*, 99 U.S. at 598-605 (distinguishing current accomplice liability from approvement); *see also Ex Parte* Wells, 59 U.S. (18 How.) 307 (1855).

494. *See* King v. United States, 203 F.2d 525, 526 (8th Cir. 1953).

495. *See, e.g.*, Jones v. United States, 266 F.2d 924, 928-29 (D.C. Cir. 1959); United States *ex rel.* Newsham v. Lockheed Missiles and Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989); United States *ex rel.* Stillwell v. Hughes Helicopter, 714 F. Supp. 1084, 1097 (C.D. Cal. 1989); Connecticut Action Now v. Roberts Plating Co., 330 F. Supp. 695, 696-97 (D. Conn. 1971), *aff'd*, 457 F.2d 81 (2d Cir. 1972); Bass Anglers Sportsman's Soc'y of Am. v. Scholze Tannery, 329 F. Supp. 339, 344 (E.D. Tenn. 1971); United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87, 90 n.6 (D. Minn. 1971).

COINTELPRO. The jailhouse informant scandal in Los Angeles persisted throughout the 1980s. Currently, the experiences of the U.S. Attorney's office in Chicago and the FBI with respect to the World Trade Center bombing evidence informant misuse in the 1990s. The continuing presence of informant-handler relations and the resulting victimization show that despite over 500 years of history, the flaws in the informant system have never been effectively reformed.

B. Establishing Informant-Handler Linkages

This article identifies two key problems with the assumption of risk and distancing doctrines that courts use to analyze informant-handler relationships. First, courts do not recognize the absence of an effective form of control over abuse and mishandling. Secondly, courts do not incorporate the historical aspects of the informant/handler relationship that define their function and existence today. Suggestions for solutions to these problems have not gone far enough toward altering the basic assumptions that underlie the way courts view informants.[496]

Therefore, courts should create a presumption that acts of informants are state action or under color of law. The presumption would include all informants who provide information, assistance, or some other benefit to a law enforcement agency in exchange for some benefit, whether immediate or in the future, tangible or intangible, personal or to a third party. As discussed previously, the test requires that an informant be a state actor and that the acts be fairly attributable to the state.[497]

1. The Informant Clothed as State Actor

The first part of the state action test asks whether the person is a state actor. This test somewhat overlaps with the under color of law test for § 1983.[498] Actions or conduct of handlers, with respect to informants, are made "under color of" law and by a "state actor." The handler, whether police, sheriff, or prosecutor, undoubtedly approaches, enlists, compensates, and utilizes the informant strictly under the authorization and within the confines of the handler's duties as an official of the state, county, or municipal entity. This basic authority of law that empowers the police, sheriff, or prosecutor to employ the informant is at the heart of the problem.

496. *See* notes 284-310.
497. *See supra* notes 400-412 and accompanying text.
498. *See* notes 390-396 and accompanying text.

Informants themselves require little scrutiny to determine whether they are clothed with state authority. Historically, the informant has served a traditional state investigatory function.[499] No informant may act beyond the capability of an undercover agent. Albeit, the informant may be better situated such that his or her use is more expedient and less suspicious. This, however, does not undermine the traditional nature of the informant's role as one of the state.

The "clothing" of informants, that is the delegation and assumption of authority, is apparent in the abuses rendered by informants.[500] Here, one must consider the informant's motivations, the handler's motivations, and the mental manipulations beneath their interrelationship in general. All of these indicate a transfer of the status of lawful authority or license. First, the handler's instruction not to break the law and the informant's law enforcement authority do not alter this relationship if neither treats the instructions seriously.[501] Second, no interpretation of "under color of law" or "state actor" requires a formalistic transfer or existence of actual lawful authority.[502] The informant's personal belief that actions are sanctioned, necessary, or authorized by the handler is sufficient to clothe the informant as a state actor. The existence of guise and pretense is expected by both informant and handler.[503] The informants know they are acting under

499. *See supra* notes 413-490 and accompanying text.

500. *See supra* notes 232-292 and accompanying text.

501. *See supra* notes 314-326. In *Simpson*, the handlers instructed the informant, who was known to the handlers to be a prostitute and drug user, not to get sexually involved with the defendant. United States v. Simpson, 813 F.2d 1462, 1467 (9th Cir. 1987). Absent explicit instruction or encouragement otherwise, the court refused to place any responsibility on the government for the resulting sexual relationship between the informant and the defendant. *Id.* at 468. *See also* United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978) (no due process violation in informant's, sexual relationship with defendant where "her official role was limited to that of introducing a willing seller of narcotics to a willing purchaser"); United States v. York, 830 F.2d 885, 889-90 (8th Cir. 1987) (affirming denial of jury instruction on informant agency where FBI repeatedly admonished informant not to participate in conduct like that which led to the charges).

502. *See* Hampton v. Hanrahan, 600 F.2d 600, 609-10 (7th Cir. 1979) (identifying informant acts supporting constitutional violations, but not including any direct transfer of authority to informant); Matje v. Leis, 571 F. Supp. 918, 925 (S.D. Ohio 1983) (presumed).

Realistically, within a police department and even generally, the delegation of authority will be by means other than formal written notification. Eric Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 228 (1979); Susan Bandes, Monell, Parratt, Daniels, *and* Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 147 (1986).

503. *See supra* notes 390-396 and accompanying text. In *Matje v. Leis*, the court specifically rejected defendants' argument that the informant had to "purport" to act under color of law. Instead, reasoned the court, the very nature of undercover work is sufficient to "cloth" the nature of the act with authority of the state. 571 F. Supp. at 925. *See Simpson*,

"cover" and the handler wants the informant to maintain pretense and produce results.

The handler's intent and purpose cannot be determinative because the process from the state's perspective is ends-oriented, not means-oriented.[504] The handler wants the informant to function, oftentimes regardless of cost. The handler views any extra activity, such as the commission of torts or crimes, or the creation of other distinct complications, as secondary to obtaining the necessary information.[505]

The practicalities and psychologies of the informant-handler relationship incorporate, compensate for, and actually thrive on, the transfer of authorization or legal authority. Essentially, defining informant actions as "under color of" law is the first step towards making handlers more cognizant of and accountable for the problems associated with informants. By continually embracing a gulf between the informant and the handler or the state, courts further the unarticulated redistribution of authority to informants.

2. *Informant Abuse Fairly Attributable to the State*

Careful examination of the factors relating to "fairly attributable" supports the presumption that informant actions meet this test as well.[506] Here, the critical question is whether the challenged action constitutes conduct by the informant or the handler. While the handler's conduct is in all probability fairly attributable to the state, the informant's conduct is critical in establishing proximate cause with respect to the handler or the handler's employer.

Examining informant-handler relationships in terms of typical employment situations is unfruitful. The nature of this relationship is

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813 F.2d at 1466, 1468 (government used "artifice and stratagem" even if "neither appealing nor moral") (quoting United States v. Ramirez, 710 F.2d 535, 541 (9th Cir. 1983), and United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986)).

504. *See supra* notes 356-381 and accompanying text; Bond v. Asiala, 704 F.2d 309, 311-13 (6th Cir. 1983) (discussing officer's liability for failing to verify informant information).

505. *See supra* notes 356-381 and accompanying text. *See also* Waller v. Butkovich, 584 F. Supp. 909, 932 (M.D.N.C. 1984) (FBI awareness and failure to prevent criminal activity created responsibility); Brown v. State's Atty., 783 F. Supp. 1149, 1153-54 (N.D. Ill. 1992) (officers directed informant to search and steal from plaintiff's apartment). However, in *Simpson*, the court stated that knowledge of criminal activity was irrelevant absent urging, approval or violence. 813 F.2d at 1469-70 & n.9. *But see Hampton*, 425 U.S. at 493 n.4 ("Government 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.") (quoting United States v. Archer, 486 F.2d 670, 676-77 (2nd Cir. 1973)) (Powell, J., concurring).

506. *See supra* notes 400-402 and accompanying text. Terminology here is limited to state action because this is where the divergence between the terms is most likely to occur.

inherently intertwined and mutually self-serving. Typically, informants are compelled or subjected to service through some level of coercion, be it direct or indirect, real or perceived, psychological or physical.[507] Facing incarceration or other harsh treatment from law enforcement, the informant may see few alternatives to cooperation with the handlers or the state. From this, a high degree of mutuality in the relationship develops. This mutuality can exist on several levels, including a cooperative level, a give-and-take level, and a reliance level. On each level, however, the informant works closely with the handler or the state and the same level of transfer of discretion exists.[508] Under this perspective, the nature of the relationship must predominate over the inspection of superficial employment characteristics in determining an informant's position.[509]

If the informant is initially cooperative and accepting of the position, then the relationship would be characterized by mutual trust and close cooperation in the fulfillment of the informant's responsibilities. This type of relationship will also, logically, include some benefit or form of compensation for the informant. Trust will result and the handler will exercise less control and grant more discretion to the informant. Here, the compensation, trust and discretion are similar to an employment relationship that courts usually desire when finding action fairly attributable to the state.[510]

If the relationship is initially more give and take (that is, a negotiation of informant status) or dependent upon reliance (that is, the informant is less volitional), the result should not differ significantly. The level of control used, the level of trust given, and the amount of discretion allocated may vary, but the essential nature of the relationship remains unchanged. In terms of degree, unless the informant does not know that he or she is providing information and serving the

507. Misner & Clough, *supra* note 20, at 715 n.12. *See also supra* note 455 (on the exclusion of voluntary informants from this analysis); United States v. Ryan, 548 F.2d 782, 788-89 (9th Cir.), *cert. denied*, 430 U.S. 965 (1976) (no due process violation when government pressured informant with threats of criminal prosecution and irreparable damage to health from imprisonment).

508. *See supra* text accompanying notes 356-381. *But see Simpson*, 813 F.2d at 1469 n.8 (court suggested that only means to show that informant was unwillingly enlisted is lack of competence).

509. *See, e.g.*, Ghandi v. Police Dept. of Detroit, 823 F.2d 959, 963-64 (6th Cir. 1987) (rejecting the per se rule that informants are acting under color of law in favor of inspecting factors such as compensation, acts "together" with the government, aid from government, and "placement" of the informant by the government). *But see York*, 830 F.2d at 889-890 (evidence that FBI failed to follow internal guidelines and procedures for handling informants irrelevant).

510. *See supra* notes 400-402 and accompanying text.

handler, the relationship will develop such that interdependence and discretion predominate. Thus, this interdependence and intertwining reflects the mutuality and close cooperation needed for actions to be fairly attributable to the state. Fixation upon a pure causal connection at this stage merely ignores the nature of the informant-handler relationship.

3. Informant State Action

Why, then, have courts been so intent upon distancing informants from their handlers and the government? One answer is that the separation is a by-product of deference to law enforcement. Courts have been very unwilling to intercede into the operations of police departments, especially those deemed day-to-day operations.[511] This deference, however, is inappropriate with respect to informants because informants are not completely internal fixtures of the department. Rather, they function as the tentacles of law enforcement that reach out into the community. Courts must allow greater exploration of the informant's background and the nature of the informant-state relationship.[512] Further, the courts should fairly evaluate and balance the desires for informants to receive rewards against existing and potential ills.

Courts may also operate with false assumptions about the nature of informants and their relationships with their handlers. Rather than assuming that misconduct and mishandling encountered is the norm, most courts mistakenly assume this to be an anomaly.[513] Therefore, courts should adopt the presumption of state action and shift the burden to the handler.

The state action and color of law presumptions bring the informant directly within liability under § 1983 and narrow the proof needed to establish a causal connection between the handler and the informant's conduct. This showing is necessary to bring a claim against the informant under § 1983. The essence of the color of law inquiry fo-

511. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 392 (1989) ("endless exercise of second-guessing municipal employee-training programs . . . is an exercise . . . the federal courts are ill suited to undertake"); Rizzo v. Goode, 423 U.S. 362, 378-380 (1976) (overturning order requiring the Philadelphia Police Department to draft a comprehensive program for responses to civilian complaints of police misconduct).

512. *But see York*, 830 F.2d at 889 (the exclusion of all documents regarding the informant-State relationship was appropriate where court allowed some documents and cross-examination into the relationship).

513. *But see* Waller v. Butkovich, 584 F. Supp. 909, 943 (M.D.N.C. 1984) (presumes agency relationship where two informants infiltrated the Klan and Nazis and actively participated in planning and encouragement of attacks).

cuses on the relationship between the informant and the handler. This proposal does not necessitate any change in the state actor or color of law legal standards, but merely brings into the analysis law enforcement experience and theory and a historical perspective. This analytical framework will allow courts to clearly view and examine the true nature of the informant-handler relationship.

C. Consequences of the Presumption

Limitations on law enforcement, even those implemented for good reason, are usually viewed as too constrictive. A brief discussion of how the presumption may affect criminal law enforcement and civil liability will illuminate some of the implications of adopting this presumption.

This presumption will alter the legal approach to informants in both civil and criminal litigation. In criminal cases, courts place blame on the defendant, turning attention away from the informant-handler relationship when informant misconduct and mishandling arises. No such shifting of blame would occur, however, if the informant were a law enforcement officer or other agent of the state. Presuming informant actions are state actions will redirect responsibility for mishandling and misconduct of informants back to the state, which can choose whether to accept and to use the informant.

On the civil side, the obstacles to relief for informant mishandling and misconduct are more extensive. Suing the informant will most likely result in little gain in relief or systemic change. Civil litigation against the individual handler or the employer (the municipality) would yield different results. Although the victims may be unappealing, the current magnitude of mishandling and misconduct may counterbalance this factor.

1. Criminal Law Enforcement

The effect on law enforcement can take two different forms. First, the presumption could affect how basic law enforcement programs are implemented on the street. Second, the presumption could change the outcome of criminal defense challenges to informant misconduct. A study of using law enforcement personnel instead of informants will be used to discuss the first effect. *Weatherford* will be revisited to discuss the second effect.

One chief goal of law enforcement, according to both conventionalists and realists, is the substitution of law enforcement personnel for informants. The targeting of particular individuals for particular

crimes is relatively simple to implement and assess.[514] The greatest cost in this respect would be a need for new personnel for undercover details. Further, administrative concerns regarding the use, shifting, and reallocation of exposed undercover personnel would increase. If this is truly a goal of law enforcement, however, then some effort at implementation should follow.

With respect to less focused investigations, the substitution of law enforcement personnel for informants has proven successful. For example, one study of several metropolitan operations revealed high levels of success in substituting law enforcement personnel for informants in a fencing operation.[515] While the operations did not necessarily reduce crime, they did eliminate the need for informants in those types of operations.[516] Finally, and most advantageously, a higher degree of law enforcement control over the criminal environment resulted from the undercover operation involving law enforcement personnel.[517] Thus, law enforcement can effectively function in many areas without tremendous dependence upon informants.

In *Weatherford*, the Court specifically found that Weatherford's attendance at meetings between Bursey and his counsel did not violate the Sixth Amendment right to counsel nor the Fourteenth Amendment Due Process Clause because: (1) the attendance was not to seek information, (2) the informant did not ask questions, (3) the informant did not relay information back to the government handlers, (4) the attendance was only to maintain the informant's cover, and (5) no identifiable prejudice resulted. Presuming that Weatherford was acting under color of law or was a state actor, several of these factors are either met or no longer offer valuable insight.

The most obvious change in perspective is in relation to the third factor. As a state actor, Weatherford's presence and listening immediately brought the information back to the government. Second, the informant's mere listening without asking questions (factor two) is not patently innocent. Third, the harm in Weatherford's presence (factor five) is more obvious because he is a conduit back to the prosecution. Finally, the lack of a specific intent to seek information (factor one) or that he attended only to maintain the cover (factor four) would be secondary to Weatherford's motivations as an informant and the police and prosecution's motives for using him. In this respect, the case

514. MARX, *supra* note 14, at 108.
515. *Id.* at 109-12.
516. *Id.* at 112-14.
517. *Id.* at 127-28.

presents a very different situation. The conduct is more intrusive. The relationship between informant and handler is more important, and the handlers must have more responsibility.

For those who may still wonder why Weatherford should be so closely linked with his handlers, the court of appeals decision recounted how Weatherford was identified as an informant: He was seen vacationing with several state drug agents at Hilton Head Island between the arrest and the trial. The prosecutor had given his permission for the trip.[518]

2. *Municipal Liability for Customary Use of Informants*

Section 1983 allows claims against every "person" who "subjects, or causes to be subjected" any citizen to the appropriate violation.[519] The definition of "person" includes municipalities when their policy, custom, or practice causes the injury.[520] Thus, the victim of informant misconduct or mishandling can sue the municipality if the informant activity is the product of municipal policy, custom, or practice. The prospect of compensatory damage awards for informant mishandling and misconduct would then influence municipalities either to reallocate resources away from informants, or to acknowledge the potential for abuse and to curb informant use.

No municipality has been held liable, and by implication accountable or responsible, for the mishandling or misconduct of an informant. Those cases in which municipal liability claims were made but lost shed little insight into the underlying reasoning.[521] However, the impediments here stem from the incorrect presumptions and preconceptions regarding informants. It is easy to isolate and discount or distinguish the circumstances of one informant and one handler, espe-

518. Bursey v. Weatherford, 528 F.2d 483, 485 n.2. (4th Cir. 1975).

519. 42 U.S.C. § 1983.

520. Monell v. Department of Social Servs., 436 U.S. 658, 691-95 (1978).

521. *See* Hobson v. Wilson, 737 F.2d 1, 53-55 (D.C. Cir. 1984) (court refused to impute knowledge of police infiltration and disruption to supervisors and "scattered events" involving informants were not custom, policy or practice); Waller v. Butkovich, 584 F. Supp. 909, 934 (M.D.N.C. 1984) (policy allegations were too conclusory). In addition, the Federal Tort Claims Act's exclusions of discretionary functions and challenges to formulation of policies have resulted in drastic limitations on liability. *See, e.g.*, Bergman v. United States, 689 F.2d 789, 794 (8th Cir. 1982) (under FTCA, absence of guidelines and resultant discretion in selection of informants is not actionable); Liuzzo v. United States, 508 F. Supp. 923, 931 (E.D. Mich. 1981) (cannot challenge formation of informant policy under FTCA, but can challenge implementation). *See also supra* notes 381-444 and accompanying text [civil liability cases].

cially where the practice itself is labelled "highly individualistic."[522] However, when taken in the context of that particular law enforcement agency, law enforcement agencies in general, the history of informant use,[523] and the replete record of abuses, the decision to isolate, discount, distinguish, or otherwise distance the mishandling and its impact from the municipality is less convincing.

Municipal liability requires (1) the existence of some policy, custom, or usage that (2) directly causes a (3) constitutional deprivation.[524] The preceding discussion of state action and color of law greatly impacts upon the proximate cause analysis.[525] The ensuing discussion will address the policy, custom, or usage requirement. In *Monell v. Department of Social Services*,[526] the Supreme Court reversed *Monroe* insofar as that decision found municipalities were not "persons" within the meaning of section 1983.[527] The Court specifically held that a class of women could sue the municipality for relief based upon a written departmental policy that required women to take unpaid maternity leave after the fifth month of pregnancy. The Court, in further explaining the bases for municipal liability, held that municipalities are equally liable for a "decision officially adopted and promulgated by that body's officers" and for "governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Finally, the *Monell* Court excluded liability based upon respondeat superior.[528]

In particular, a custom must be the result of "persistent and widespread . . . practices of state officials . . . so permanent and well settled as to constitute a 'custom or usage' with the force of law."[529] The essence of custom is toleration of such activity resulting in actual or

522. Farris, *supra* note 4, at 33. In City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), the Court held that a single isolated shooting by a police officer did not sufficiently prove a municipal policy, custom or practice and therefore, the claim was not actionable against the municipality.

523. *See supra* notes 413-490 and accompanying text.

524. City of Canton v. Harris, 489 U.S. 378, 385 (1989). The question of the specific constitutional deprivation or violation will not be addressed here.

525. See text accompanying notes 498-513.

526. 436 U.S. 658 (1978).

527. *Id.* at 665-690 (overruling *Monroe*, 365 U.S. at 187).

528. *Id.* at 690-92.

529. *Id.* at 691 (quoting *Adickes*, 398 U.S. at 167-68). *See Monell*, 436 U.S. at 691 n.56 (quoting Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940) ("Settled state practice . . . can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer than the dead words of the written text.").

constructive knowledge of the offensive behavior.[530] The factors necessary are not rigid. A custom need not be longstanding.[531] Nor is the level of participation determinative of custom, although for a longstanding custom "a smaller rate of official participation will be necessary to qualify."[532] The seriousness of the injury or gravity of the conduct impacts as well, where a higher degree creates more of an impression of official tolerance.[533] Thus, custom can arise where no written policy on the offensive behavior exists, where the written policy only partially addresses the offensive behavior, or where the written policy addresses and prohibits the offensive behavior but the prohibition is ignored and the transgressions are ratified by inaction.[534]

Because of the lengthy history of informants both generally and within every federal, state, or local law enforcement entity, the establishment of custom is the most viable means of showing policy to redress informant mishandling. Admittedly, some difficulty in generalizing exists here. Each entity will have its own history of informants, of efforts to control informants, and of mishandling and misconduct of informants. That does not, however, render an exploration of the history meaningless. For those municipalities that have scorned the use of informants, municipal liability may not exist—a just reward for their insight. For others, the time has come for introspection, evaluation, and, absent any change, accountability.[535]

530. Bandes, *supra* note 502, at 151 (footnotes omitted). *See also* Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989) (actual or constructive knowledge), *cert. denied sub nom. City of Everett v. Bordanaro*, 493 U.S. 820 (1989).

531. Schnapper, *supra* note 502, at 230 ("the official tolerance towards racial and political violence with which Congress was concerned in 1871 was thought to have arisen only in the previous year or two").

532. *Id.*

533. *Id.*

534. Bandes, *supra* note 502, at 152 (custom exists where "the entire police force ignores the policy and engages in a long-standing practice . . . with the police chief's awareness"); Schnapper, *supra* note 502, at 229 ("supporters of section 1983 were concerned . . . [with] the widespread and persistent practices of ordinary sheriffs, judges, and prosecutors").

The constitutionality of the challenged policy is of no significance. In *City of Canton*, the Court held that constitutional policies are as actionable as unconstitutional policies so long as the policy directly results in constitutional violations. City of Canton v. Harris, 489 U.S. 378, 387 (1989).

535. Municipalities have no immunity from liability under *Monell*. Owen v. City of Independence, 445 U.S. 622 (1980). Thus, no argument could be made that the widespread, prior approval of the use of informants by the courts somehow misled law enforcement or lulled them into believing that their practices were beyond reproach.

Custom is not always easy to prove. Often, the proof is dependent upon identification and presentation of the generally accepted workings of the law enforcement agency. This may not be difficult because the uses, abuses and handling of informants are open and notorious. Nevertheless, law enforcement officers have been known to become silent when internal practices are opened to review and criticism.[536] Given the general historical acceptance of informants as an integral part of law enforcement, however, a court could certainly make inferences about the existence of informant custom, require the law enforcement entity to prove otherwise, infer custom, and force the code of silence to confirm its existence.

The historical use and acceptance of informants readily supports the custom requirements of being persistent, widespread, "permanent, and well-settled." The broader historical perspective and ineffective means of control should be known to most law enforcement hierarchies. Likewise, given the newsworthy nature of abuses, law enforcement supervisors would be hard pressed to show lack of notice or knowledge of informant abuses and mishandling.

A general tolerance of the abuses is beyond question. The courts' continual receptiveness and protection of informants, handlers and law enforcement agencies can only breed complacency in the use of informants. The accepted practice is the deep integration of informants into the day-to-day workings of law enforcement, relying on their production of information and set-ups for crimes. To say that handlers would tolerate what is commonplace verges on redundance. While tolerance denotes hardship or endurance of something harsh or painful, the entity's receptiveness to following the custom is not evaluated subjectively but rather by the harm resulting from the custom. "Courts have countenanced the use of informants from time immemorial."[537] Law enforcement agencies and municipalities have basked in this approbation.

536. *See, e.g.*, Thomas v. City of New Orleans, 687 F.2d 80, 81-82 (5th Cir. 1982) (involving suit by officer after discharge for breaking code of silence by failing to sign a report that did not include fellow officer's brutality); Bonsignore v. City of New York, 521 F. Supp. 394 (S.D.N.Y. 1981) (suit by wife of officer who shot her alleging that code of silence prevented adequate detection of officers in need of psychological evaluation), *aff'd*, 683 F.2d 635, 636 (2d Cir. 1982). *See also* DAVID RUDOVSKY & MICHAEL AVERY, POLICE MISCONDUCT LAW AND LITIGATION §14.8 (1993).

537. *Dennis*, 183 F.2d at 224.

VII. Conclusion

Law enforcement has long reaped and extolled the benefits of informants. Courts have uniformly relegated the interests of victims of informant misconduct and mishandling to those of law enforcement. Meanwhile, informant mishandling and abuse remain unchecked.

Law enforcement's decision to use informants must be balanced with the realities and flaws of the informant system. Ideally, society would be enhanced by the abolishment of informants. It is unrealistic, however, to expect slow moving institutions like law enforcement and the courts to completely abandon the use of informants.

Expanding constitutional protections for informant violations is beneficial, yet insufficient. The more challenging and far reaching solution, however, is to instill a realistic treatment of the informant-handler linkages and hold handlers and their employers responsible for the results. Reform aimed solely at the constitutional avenues is insufficient because it fails to address judicial presumptions. Only by discerning that those presumptions are wrong and by reforming the evaluative process can the balance sought be reached.

The color of law and state action approaches are merely two different ways to show the linkages between informants and handlers. While neither theory arises in most criminal cases, the question is impliedly addressed all the time. Insight obtained by this or through other means is beneficial if the end product is to reassess the relationship.

Likewise, the existence of municipal liability for the handling and control of informants is integral to instilling responsibility and accountability for that conduct. Currently, civil liability offers little promise for an aggrieved plaintiff or society in terms of imposing a disincentive to unwelcome conduct. Although not addressed directly, both aspects (linkages and municipal liability) bear on the analysis of individual liability under § 1983 for handlers.

The use of informants and their relationship to government handlers has not changed much since Thomas May warned of their evils in 1863.[538] Although current use of informants has not reached the proportions envisioned by George Orwell, in *1984*,[539] the courts now have an opportunity and means to prevent our nation from becoming a society of spies.

538. *See supra* note 1, at 277-78.

539. GEORGE ORWELL, 1984 (1st America ed., Harcourt Brace 1949).